Petition

81-1411

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CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRED W. PHELPS, SR.,

Petitioner,

-vs-

THE KANSAS SUPREME COURT; THE HONORABLE ALFRED G. SCHROEDER; THE HONORABLE ALEX M. FROMME; THE HONORABLE DAVID PRAGER; THE HONORABLE ROBERT H. MILLER; THE HONORABLE RICHARD M. HOLMES; THE HONORABLE KAY McFARLAND; and, THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court; and, THE STATE OF KANSAS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Questions Presented
(Rule 21.1[a])

1. Whether an attorney disbarred in a state court proceeding may bring in federal district court a "suit in equity" under 42 U.S.C. § 1983 to enjoin an order of disbarment when that order was, in part, based on proceedings which violate the due process clause of the Fourteenth Amendment. Rule 17.1(c).

2. Whether an attorney's § 1983 action should be dismissed under circumstances where nine federal court judges (three district and six circuit judges) have concluded that a state court's order of disbarment was in part based on a charge of which the attorney had neither notice nor opportunity to be heard. Id.

3. Whether this § 1983 action should have been entertained and an order entered delcaring the challenged procedure unconstitutional and enjoining the disbarment

order as it now stands infected with unconstitutional proceedings. Id.

4. Whether the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [petitioner herein] of procedural due process." In re Ruffalo, 390 U.S. at 552. Id.

5. Whether the circuit court majority herein erred in minimizing the importance of the state court's said due process violation, when that violation alone accounts for the state court disbarring petitioner rather than merely censuring petitioner as the state disciplinary hearing panel recommended. Id.

6. Whether the dissenting opinion of Circuit Judge McKay herein should not in fact be the law of this case, rather than the manifestly erroneous (both factually and legally) opinion of the two-Judge majority herein being the law. Id.

7. Whether this petitioner, described by the federal district court as "a civil rights attorney of well-known repute," and as one of whom that court recently wrote: "The Court has never questioned the abilities, skills and personal moral character of [Mr. Phelps],"[1] should be allowed by the federal court to be unconstitutionally deprived of his license and livelihood by a state court under circumstances suggesting that he was thus singled out for punishment precisely because of his unpopularity for championing civil rights causes. Rule 17.1(a).

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[1] In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., No. 80-1152, slip opinion, 11/30/1981, Theis, Stanley, Saffels, JJ., unpublished (D.Kan. 1980).

[1a] Cover sheet caption contains the names of all "parties to the proceeding in the court whose judgment is sought to be reviewed, . . ." See Rule 21.1(b) of the Rules of the Supreme Court of the United States.

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

TO: The Honorable, the Chief Justice
and Associate Justices of the
Supreme Court of the United States:

Petitioner, Fred W. Phelps, Sr., prays that a Writ of Certiorari be issued to review the judgment order of the United States Court of Appeals for the Tenth Circuit entered in the above case on October 5, 1981, rehearing denied November 19, 1981.

Opinions Below
(Rule 21.1[d])

The decision and order of the District Court for the District of Kansas is printed in Appendix "A" and is unreported. The opinion of the United States Court of Appeals for the Tenth

Circuit entered October 5, 1981, is printed in Appendix "B" hereto and is reported at 662 F.2d 649 (1981). The order denying rehearing is printed in Appendix "C" hereto.

Jurisdiction
(Rule 21.1[e])

The three-Judge panel opinion of the United States Court of Appeals, Tenth Circuit, upon which certiorari is sought, was dated and filed October 5, 1981, rehearing denied November 19, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c).

Statutes Involved
(Rule 21.1[f])

The constitutional provision involved is the Fourteenth Amendment, §§ 1 & 5, as follows:

> § 1. Citizenship; privileges or immunities; due process clause. All persons born or naturlized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * *
>
> § 5. Enforcement of amendment. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The primary statute involved is 28 U.S.C. § 1331(a), from a jurisdictional standpoint, and provides:

> Federal question; amount in controversy; costs.
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States,

except that no such sum or value shall be required in any such action brought against the United States, an agency thereof, or any officer or employee thereof in his official capacity.

An additional jurisdictional statute involved is 28 U.S.C. § 1343, subsections (3) and (4):

Civil rights and elective franchise.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

The primary, indeed only, substantive statute involved is 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Statement of the Case
(Rule 21.1[g])

Initially, pursuant to Rule 21.1(i), the basis "for federal jurisdiction in the court of first instance", is that set forth above.

When the Kansas Supreme Court reviewed the charges, record and recommendations of the state disciplinary board, it rejected that board's

recommendation of public censure and instead ordered Mr. Phelps disbarred. State v. Phelps, 226 Kan. 771, 598 P.2d 180 (1979), cert. denied, 444 U.S. 1045 (1980). This drastically increased penalty was occasioned because the Kansas court added another violation which Phelps had neither notice of nor opportunity to be heard on. Indeed, the first Mr. Phelps knew of the matter was when he got the order of disbarment in the mail.

Thereafter, Phelps brought this § 1983 action.

Thereafter, a three-judge federal district court panel in Kansas, following a show cause hearing, concluded that the Kansas Supreme Court had violated due process, and based thereon, refused to disbar Phelps from practice in the federal courts of Kansas. In re Phelps, No. 80-1152, slip op. November 3, 1980, Theis,

Stanley and Saffels, JJ., unpublished (D.Kan. 1980).

Thereafter, a three-judge panel in the Tenth Circuit affirmed, likewise finding due process violation by the Kansas court, and based thereon, refused to disbar Phelps in the circuit court. In re Phelps, 637 F.2d 171 (10th Cir. 1981).

Nevertheless, a majority of the instant three-judge panel, by minimizing said due process violation by the Kansas court, erroneously calling it mere dictum, voted to dismiss this § 1983 action. 662 F.2d at 652. Petitioner seeks certiorari therefrom.

Only Judge McKay, strongly dissenting herein, has clearly and accurately grasped the factual and legal issues of this case, concluding, 662 F.2d at 655-656:

> "The Order of Disbarment was in part based on a charge of which

appellant had neither notice nor an opportunity to be heard, both of which are mandated by the fourteenth amendment. Consequently, I believe the district court erroneously dismissed this § 1983 action. What the state court would have done had the charge of violation of DR 7-102(A)(1) been excluded, or had appellant been accorded notice of and an opportunity to respond to it, we do not know. The trial court should have entertained the action and entered an order declaring the challenged procedure unconstitutional and enjoining the disbarment order as it now stands infected with unconstitutional proceedings. I hasten to add that I would not prohibit the Kansas Supreme Court from taking such constitutional proceedings and actions as it subsequently may determine are proper in this case.

I would reverse and remand for the entry of an appropriate order consistent with these views."

Reasons for the Allowance of the Writ
(Rules 17.1[a][c] and 21.1[j])

1. In addition to the foregoing, petitioner can do no better than referring to the well-reasoned dissenting opinion of Circuit Judge McKay herein at Appendix "B" hereto, pages 15-29. 662 F.2d at 652-656.

2. Professor Monroe Friedman, probably this country's leading authority on legal ethics, read a paper to the federal district court on this petitioner's behalf, wherein after reviewing the entire record before the Kansas court, he opined that petitioner had committed no ethical violation, saying:

> "I feel . . . strongly that this particular case is one that should never have been brought." (T. 28).
>
> "I showed [Mr. Phelps and Mr. Fisher] the

> quote from the Harvard Civil Rights, Civil Liberties Law Review . . . it has become professionally dangerous for a lawyer to be involved in representing poor people and in representing unpopular clients and unpopular causes.
>
> And I submit to Your Honors that I have come to the conscientious judgment that this is just such a case." (T. 30). In re Phelps, No. 80-1152, 2-20-80 (D.Kan. 1980).

3. In seeking to reconcile a due respect for the state court with an accommodation for their incorrect action in this case, petitioner's analysis leads him to conclude that the judges have maybe fallen into error due to extrajudicial pressures arising from the following circumstances:

a. Petitioner has for years vigorously engaged in unpopular civil rights cases,

with some success.[2] He has sued the majority of the larger corporations and governmental units in Kansas for blacks and other minorities.[3] Animosity to

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[2] Recently, even while under this cloud, petitioner has won all-white jury verdicts and judgments thereon for blacks in employment discrimination cases in excess of $750,000.00, in front of three federal judges (Rogers, O'Connor, and Kelly, Judges). (Case Nos. 78-4168, 77-4051, and 78-1378, D.Kan.). The black leadership of Kansas has testified in federal court that the black people of Kansas depend upon petitioner and look to him as their best lawful hope for obtaining equal justice under the law. (In the Matter of Fred W. Phelps, Sr., No. 80-1001-A and Colbert v. City of Wichita, No. 75-306-C5, D.Kan.; and, Irving v. Dubuque Packing Company, et al., No. 80-2146).

[3] Following is a partial list of defendants in petitioner's civil rights cases with federal court case numbers, which this Court may take judicial notice of (Brown v. Chaffee, 612 F.2d 497, 505, n. 3 [1979]): Boeing: 77-4052, 79-4183, 80-1689, 80-1709, and 81-1019; City of Wichita: 75-306-C5, 75-306-C6, 78-1005, 79-1476, 79-1539, 80-1392, and 80-1734; City of Topeka: 75-203-C5, T-5375, 76-141-C5, and, 77-4238; Kansas Power and Light: 77-4069, 77-4101, 79-4044, 79-4010, 79-4016, 79-4017, 80-4235; Jostens American Yearbook: 76-67-C5, 77-4154, 78-4078, 79-4256, 80-4263, and, 80-4297; Dubuque Packing Company: 78-1346, 78-1378, 78-1706, 78-4216, and, 80-1729;

petitioner by the affected business and political leaders of Kansas, together with the

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Safeway Stores, Incorporated: 80-1963, 80-1824, 80-1827, and, 81-1031; MBPXL Corporation: 79-4110, 80-1885, 80-4291, and, 81-1034; Santa Fe Railway Co.: 78-4277, 78-4335, and, 80-4289; Unified School District #501: 79-1408, 79-1472, and, T-5430; Beech Aircraft Corporation: 76-53-C5, 78-1347, and, 78-4234; Gates Learjet: 79-4173, and, 80-1553; City of Hutchinson: 79-1583, and, 80-1847; St. Francis Hospital: 76-46-C5, and, 77-4051; Fairway Oil Company, Inc.: 78-4168, and, 80-4170; Kansas Neurological Institute: 77-4068, and, 80-4161; Kentucky Fried Chicken: 79-4181, and, 80-4269; State of Kansas: 79-1671, and, 79-4035; Hudson Oil: 80-4179, and, 80-4185; Cessna Aircraft Company: 76-77-C5; Chaffee [Sheriff of Shawnee County, Kansas]: 77-4135; Wabunsee County: 76-32-C5; Goodyear Tire and Rubber Company: 78-4098; Commerce Bank: 78-4272; First National Bank: 79-4178; Southwest State Bank: 79-4227; Connecticut General Life Insurance Company: 78-4248; New England Life Insurance Company: 80-1914; Sunflower Beef: 80-1964; Dolly Madison Cake Company: 78-1052; Stormont-Vail Hospital: 79-4240; St. Joseph Medical Center: 78-4304; City of Eastborough: 78-4243; Sears, Roebuck & Company: 79-4057; Unified School District #259: 80-1681; Dibble Food Stores, Inc.: 80-4201; DuPont: 79-4266; Central Bank & Trust: 80-1898; Kansas State Bank: 78-4196; National Cash Register Corporation: 77-4045; Kansas Trade Union: 79-4012; Kansas University: 79-4069; Mission Township: 79-4037 Kansas State University: 78-4336; American Family Insurance: 80-4308; Junction City, Kansas: 75-159-C5; City of Marysville: 80-4206;

army of prestigious Kansas lawyers hired to defend petitioner's cases, inevitably translates to irresistible extrajudicial pressure upon the judges.[4]

Daniel International Corporation: 80-4052; Cox Machine Corporation: 80-4021; City of Emporia: 79-1626; United Mutual of Omaha: 79-4061; Hallmark Cards: 76-99-C5; J. C. Penny: 77-1495; and, City of Fredonia: 79-4038; etc.; etc.; etc.

[4] By consulting the records in Irving v. Dubugue, No. 80-2146 (Tenth Circuit); Earley v. Jostens, No. 78-4078 (D.Kan.); Smith v. Jostens, No. 79-2297 (Tenth Circuit); Marlatt v. Hutton, No. 76-46-C5 (D.Kan.); Servantez v. Tommy Oil, No. 78-4224 (D.Kan.); and, Fisher v. Anderson, No. 78-4305 (D.Kan.), the Court will find suggestions of the effects of said animosity and extrajudicial pressure from uncontroverted evidence to the following: (a) Defense counsel devised a tactic of defending petitioner's civil rights cases by attacking petitioner personally by utilizing the state court's disciplinary machinery; (b) Petitioner has been prosecuted unsuccessfully in disbarment proceedings some 40 times and falsely imprisoned once; (c) Some thirty percent of petitioner's law firm overhead and otherwise productive lawyer-manpower time must be devoted to defending said personal attacks; and, (d) Petitioner and his firm must accept this burden as another expense of doing business so long as they labor in the civil rights vineyard or until the federal courts take decisive action to their relief.

b. The Kansas court appears to have an attitude of disfavor toward equal rights for blacks, evidenced by their stripping the Kansas Commission on Civil Rights of meaningful power,[5] and their residual resentment of the Brown v. Topeka Board of Education case.[6]

c. Notwithstanding their peculiar notion that lawyers are only entitled to "rudimentary

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[5]The following cases are illustrative: Jarvis v. Kansas Commission on Civil Rights, 215 Kan. 902, 528 P.2d 1232 (1974); KCCR v. Sedgwick County Mental Health Clinic, 220 Kan. 653, 556 P.2d 180 (1976); Harder v. Kansas Comm'n on Civil Rights, 225 Kan. 556, 559, 592 P.2d 456 (1979); and, The Cessna Aircraft Company v. Kansas Commission on Civil Rights, No. 51-646, Supreme Court of Kansas (Opinion Filed January 17, 1981).

[6]224 Kan. at cli-clii.

due process" in disbarment proceedings,[7] the Kansas court has never before gone so far as to disbar an attorney without fair notice and opportunity to be heard, as in petitioner's case.

d. When a., b., and c. are taken together, an explanation for the erroneous conduct of the state court judges surfaces: extrajudicial pressure, perhaps.

4. But federal courts are committed to civil rights cases and lawyers, and have taken judicial notice that such lawyers face unique hardships not experienced by other lawyers, that it is therefore often difficult for blacks to obtain competent lawyers in civil rights cases, and that

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[7] State of Kansas v. Turner, 217 Kan. 574, 538 P. 2d 966.

without competent attorneys to champion the cause, civil rights is a dead letter.[8]

5. This Court should recognize this case for what it is and strengthen petitioner's hand in the work he is doing, rather than further chill the cause of civil rights. Petitioner is not asking that any wrongdoing be winked at and overlooked because he is a noted civil rights lawyer, but that this Court recognize there has been no wrongdoing and petitioner should not be unfairly penalized because he is a noted civil rights lawyer.

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[8] The Fifth Circuit said in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the following:

> "Civil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant. See NAACP v. Button, 371 U.S. 415, 443, 88 S.Ct. 328, 9 L.Ed.2d 405 (1963); Sanders v. Russell, 401 F.2d 241 (5th Cir. 1968). Oftentimes his decision to help eradicate discrimination is not pleasantly received by the community or his contemporaries."

6. The evidence herein demonstrates that petitioner's committment to the cause of civil rights is sincere and deeply rooted in his philosophical, religious and patriotic beliefs and convictions.[9]

7. The evidence herein is uncontroverted that the black leaders and people of Kansas in large measure depend upon petitioner, as noted, and have likened him in their esteem and expectations to Abraham Lincoln, John F. Kennedy, Martin Luther King, Jr., and John Brown.[10]

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[9] Petitioner's devotion to his civil rights legal practice is strikingly demonstrated among other ways in the evidence before this Court, by the fact that his thirteen children appear to be following in his steps and working with him in the cause, because "wisdom is justified by her children," Matthew 11:19. The present remarkable status of petitioner's children is: three (and a daughter-in-law) are now lawyers; two are in law school; four are in university, bound for law school; the rest appear headed that way. Also, see Judge Kelly's remarks in Irving, No. 80-2146 (D.Kan. 1980).

[10] A part of the uncontroverted evidence supporting this fact is found in the testimony of Rev. D. D. Miller (state NAACP leader), Rev. Charles Chapman (prominent black religious leader), and Atty. Chester Lewis (leading black Kansas lawyer).

8. When the two factors of petitioner's civil rights prominence and his unprecedented (unfair) disbarment are considered together, the result in the popular mind is inescapable: Petitioner was disbarred because he is the recognized champion of the minorities, the poor, the weak. The appearance of impropriety is strong. If "federal courts . . . cannot sensibly be indifferent to invidious [state court] rules that restrain federal practice,"[11] this Court should not allow the Kansas state court to thus impact substantially and negatively upon the cause of civil rights in the federal practice in Kansas by arbitrarily and unconstitutionally removing one of Kansas' ablest civil rights champions[12] upon a pretext and in the circumstances of this case.

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[11] Keenan v. Board of Law Examiners, 317 F.Supp. 1350 (D.C.N.C. 1970)

[12] Charles Scott (counsel for plaintiff in Brown v. Bd. of Ed., 347 U.S. 483) testified in federal court on Oct. 22, 1981, that Phelps is the foremost civil rights attorney in Kansas and Kansas blacks attribute his disbarment to this fact.

9. The entire statement of Professor Monroe Friedman referred to above demonstrates that there is no case law in support of what the lower courts have done, and in fact all of the case law is against what the lower courts have done. And LEXIS supports the Friedman statement.

10. Further authority supporting petitioner's position herein is thought to be: Schware v. Board of Law Examiners, 353 U.S. 232 at 238-239, 77 S.Ct. 752, 1 L.Ed.2d 796; Keenan v. Board of Law Examiners, 317 F.Supp. 1350 (D.C.N.C. 1970); England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976); Getty v. Reed, 547 F.2d 971 (6th Cir. 1977); Goodrich v. Supreme Court of State of South Dakota, 511 F.2d 316 (8th Cir. 1975);

Javits v. Stevens, 382 F.Supp. 131 (S.D. N.Y. 1974); In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979); Henry v. First Nat. Bank of Clarksdale, 595 F.2d 291 (5th Cir. 1979); Staud v. Stewart, 366 F.Supp. 1398 (E.D. Pa. 1973); Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir. 1972); Selling v. Radford 243 U.S. 46, 51 (370 F.2d at 462).

11. This case cannot rationally be distinguished from In Re Ruffalo, supra, and the panel majority's attempt below to make the distinction is illogical, strained, and possibly result-oriented to placate the erring Kansas Supreme Court at petitioner's expense.

12. The panel majority's approach of minimizing the importance of the serious due process violation of the Kansas Supreme Court is unworthy of that high court, and should be reversed.

13. The panel majority's gratuitous analogy to criminal law cumulative sentencing is likewise strained and illogical. This is not a case where one illegal sentence is harmless because it does not increase the overall length of a lawful and proper sentence. If there is an analogy, this is a case where notice and opportunity to be heard were denied as to one vital element necessary to justify a single sentence. Where a court's reasoning is thus clearly flawed, reversal should be granted.

14. It would be difficult to conceive of a question of more exceptional importance, than for a state's highest constitutional rights guarantor to itself become the greatest violator of those rights, and <u>that</u> against one of its own officers, and <u>that</u> to the maximum extent of its powers. Can the demise of constitutional government be far distant if

courts of last resort may grievously violate with impugnity the very constitution they are sworn to defend and uphold? Should such a thing, once detected, be minimized and brushed lightly aside by a federal court with jurisdiction? Is it not rather the time, if ever there was a time, to decisively enforce the ancient principle and law of the fiduciary: "For unto whomsoever much is given, of him shall be much required; and to whom men have committed much, of him they will ask the more." (Luke 12:48). Awesome powers are given the Kansas Supreme Court, with little outward human limitation thereon, except occasional and severely proscribed action by the federal court system. The Tenth Circuit has jurisdiction, and a clear and profoundly grave due process violation was presented for redress. Yet the panel majority said, "in the exercise of our judicial discretion we decline to

consider plaintiff's due process claim." Certiorari should be granted and the matter should be reversed and remanded with directions.

Respectfully submitted,

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Appendix

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

FRED W. PHELPS, SR.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 79-1381
	)	
THE KANSAS SUPREME COURT, THE HONORABLE ALFRED G. SCHROEDER, THE HONORABLE ALEX M. FROMME, THE HONORABLE DAVID PRAGER, THE HONORABLE ROBERT H. MILLER, THE HONORABLE RICHARD M. HOLMES, THE HONORABLE KAY McFARLAND, and THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFELL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court, and THE STATE OF KANSAS,	)	
	)	
Defendants.	)	

APPENDIX "A"

O R D E R

The above-entitled action having come before this Court upon the Plaintiff's motion for a preliminary injunction and the Defendants' motion to dismiss, the Court having advanced and consolidated the trial of this action on the merits with the hearing of the application of the Plaintiff for a preliminary injunction under Rule 65(a)(2), F.R.C.P., and the parties having stipulated to the admission in evidence of extensive and voluminous exhibits consisting in part of the entire record before the Kansas Supreme Court in the case of State v. Phelps, No. 50834, the record on appeal in two cases entitled Robinson v. Brady, the rules of the Kansas Supreme Court relating to discipline and disbarment of attorneys, and the Order of Disbarment of the Plaintiff; and the Court having heard and considered the arguments in support of and in opposition to said

motions, and having read the briefs and other documents filed in the case, and being otherwise fully advised in the premises, does find as follows:

The above-entitled case arises out of disciplinary proceedings had before the Supreme Court of the State of Kansas and its order on July 20, 1979 disbarring the Plaintiff from the practice of law before the courts of the State of Kansas. The Plaintiff seeks to enjoin enforcement of the Order of Disbarment and the rules of the Kansas Supreme Court for discipline and disbarment of attorneys because of his claims of the unconstitutionality thereof.

The disciplinary proceedings before the Supreme Court of Kansas resulted from the actions of Phelps in trying the case of Robinson v. Brady, No. 125, 742 (1977). That action was brought by Sherman Robinson against Carolene Brady, a court

reporter, of the State of Kansas. Robinson had been a defendant in a criminal action in which certain proceedings had been taken with Carolene Brady acting as the court reporter in her official capacity. Robinson alleged that Brady promised him a transcript of certain of those proceedings by a specific date and that she failed to provide Robinson with the transcript as promised. Robinson alleged in the suit that Brady had violated her official responsibilities and had breached an express contract to provide the transcript. Damages were sought from Brady as a result of her alleged actions and Phelps appeared as Robinson's attorney in the case.

During the trial of Robinson v. Brady, the court refused to hear testimony from a number of witnesses listed by Phelps. Phelps made a proffer at trial that he believed that if the witnesses

were permitted to testify they would testify, among other things, that they knew Brady, knew her reputation for truth and veracity, knew said reputation to be bad, and knew of instances where Brady had violated her sworn oath of office by leaking confidential information that she had access to through her position as a court reporter.

The case ended in a verdict for the Defendant, Carolene Brady, and at the close of trial Phelps moved for a new trial. In his motion for a new trial Phelps offered as error on the part of the trial court the refusal to hear evidence from the witnesses referred to above. He again stated in his motion for a new trial what he expected the witnesses to testify to if they were allowed to testify. The motion was denied and the case was eventually affirmed on appeal.

It was brought to the attention of the disciplinary administrator for the State of Kansas that the witnesses referred to would not have testified as Phelps had stated they would, and that Phelps had no reasonable basis upon which to assume that some or all of them would have in fact so testified. The disciplinary administrator filed proceedings against Phelps, alleging that Phelps violated the attorneys' Code of Ethics, his oath of office, and Kansas statutory law by his actions in the above case. A hearing was held before a disciplinary panel of the State of Kansas on the allegations. At that hearing it was stated that the sole issue involved was whether Phelps had a reasonable basis from which to assume that the witnesses would have testified in the manner in which he stated that he thought they would. The issue of the truth of the allegations that Phelps was attempting to prove by the

testimony was specifically excluded as an issue before the hearing panel.

The hearing panel found, as a result of the proceedings held before it, that Fred Phelps had no reasonable basis from which to have believed that witnesses would have testified as he said they would in his proffer at trial and in the motion for a new trial. The findings of the hearing panel, along with a recommendation of public censure, were sent to the Supreme Court of Kansas.

Disciplinary proceedings on the matter were had before the Kansas Supreme Court. They found that Phelps had violated his oath as an attorney, that he had violated the disciplinary rules of the State of Kansas, that he had violated Kansas statutory law by his actions. The Supreme Court did not follow the recommendations of the hearing panel in regard to the punishment it gave to Phelps.

Instead Phelps was disbarred from practice before the courts of Kansas on July 20, 1979.

Following his disbarment in that action, Phelps filed suit in this Court alleging constitutional violations in the adoption, administration, and application of the Kansas disciplinary rules pertaining to attorneys, and seeking injunctive and declaratory relief from this Court declaring said rules to be unconstitutional on their face and as applied to the Plaintiff in the disciplinary proceedings before the Kansas Supreme Court. Plaintiff prays that Defendants be enjoined and restrained from enforcing the same generally. The Defendants have moved to dismiss the complaint on the grounds that it fails to state a cause of action for which relief can be granted, and for lack of subject matter jurisdiction. The

matter is before the Court now on the merits of the action as well.

The Defendants in this action are the individual judges of the Kansas Supreme Court, the disciplinary administrator of the Kansas Supreme Court, and the State of Kansas itself. Plaintiff has styled his complaint as a civil rights complaint under 42 U.S.C. §§ 1981, 1983, 1986, and 1988, and 28 U.S.C. §§ 1331, 1343, and 2201. He also alleges many violations of the United States Constitution. Plaintiff desires the complaint to be heard as a class action suit including all of the attorneys of the State of Kansas and all of the applicants to the bar in Kansas. Plaintiff has formulated his suit to appear to be an action to protect the rights of all attorneys of the State of Kansas, and to determine the constitutionality of the rules of the Kansas

Supreme Court on their face as well as applied in his disciplinary proceedings. A close reading of the complaint indicates that the true purpose of the Plaintiff in filing this suit is to have this Court review the proceedings of the Kansas Supreme Court in its action against the Plaintiff. Plaintiff alleges that the disciplinary rules of the Kansas Supreme Court are unconstitutional on their face, but informs the Court that it is necessary to go into his particular case to show why the rules are unconstitutional as written. He asserts in his complaint that, "the entire course of conduct of Defendants as complained of herein with respect to their treatment of this Plaintiff, illustrates and demonstrates that Defendants have adopted and are administering said Rules in violation of the Federal Constitution." Plaintiff desires a review of the proceedings had

in his individual case, claiming in part that it is necessary to review those proceedings to understand the underlying unconstitutionality of the rules.

The necessity for this type of attack is evident. The United States Supreme Court and the lower federal courts have held numerous times that the lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts. Selling v. Radford, 243 U.S. 46 (1917), Theard v. U.S., 354 U.S. 278 (1958), Gately v. Sutton, 310 F.2d 107 (10th Cir., 1962), and Doe v. Pringle, 550 F.2d 596 (10th Cir., 1976). This is true even though the state court proceedings are alleged to have been constitutionally deficient. The Tenth Circuit in Doe v. Pringle, supra, at 599, held that, "We concur in the district court's finding that it is without subject matter

jurisdiction to review a final order of the Colorado Supreme Court denying a particular application for admission to the Colorado Bar. This rule applies even though, as here, the challenge is anchored to alleged deprivations of federally protected due process and equal protection rights . . .. Doe cannot invoke the provisions of § 1983 of the Civil Rights Act in federal district court so as to circumvent and avoid his obligation to seek direct review in the United States Supreme Court." The civil rights statutes may not be read as asserting a new form of federal review between the appellate courts of the state and the United States Supreme Court. Mildner v. Gulotta, 405 F.Supp. 182 (D.C.N.Y., 1975).

As indicated by the court in Doe v. Pringle, supra, the only federal court that may review the proceedings

of the Kansas Supreme Court is the United States Supreme Court. We do not have the authority to review the proceedings of the Kansas Supreme Court in the matter of the disbarment of Fred Phelps. Mayes v. Honn, 542 F.2d 822, 823 (10th Cir., 1977). That the United States Supreme Court will and does review disciplinary proceedings of state supreme courts is shown by the number of such cases recently before the Supreme Court. Bates v. State Bar of Arizona, 433 U.S. 350 (1977), Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), In Re Primus, 436 U.S. 411 (1978). All of those proceedings, reached the United States Supreme Court on writ of certiorari from the state courts.

However, the court in Doe v. Pringle, supra, acknowledged that the situation is different when the complainant asserts due process or equal protection deprivations in the adoption and/or administration

of general rules and regulations governing admission and discipline. This Court does have the ability to determine the Plaintiff's allegations that the rules of the Kansas Supreme Court are unconstitutional as generally written and administered.

Disbarment, while designed for the protection of the public, is in effect a taking of the right to practice law as punishment to the attorney. An attorney is entitled to procedural due process during disbarment proceedings. In Re Ruffalo, 390 U.S. 544 (1968). Procedural due process generally means that a party is entitled to notice of the charges against him, In Re Ruffalo, supra, In Re Oliver, 333 U.S. 257 (1948), and Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978), and a hearing on those charges. Mathews v. Eldridge, 424 U.S. 319 (1976), Boddie v. Connecticut, 401 U.S. 371 (1971), and Wolf v. McDonnell,

418 U.S. 539 (1974).

There are no set rules as to what type of hearing and notice procedural due process demands. Procedural due process calls for such protection as the situation demands. Memphis Light, Gas and Water Division v. Craft, supra. The Supreme Court in Mathews v. Eldridge, supra, set out a balancing test to be used as a guideline to the type of protection that an individual is to be afforded in varying situations. "Our decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards; and, finally, the Government's interest,

including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement will entail."

A view of the Kansas disciplinary rules and the way in which they are applied shows that they provide more than adequate due process and equal protection. All complaints against an attorney must go through the disciplinary administrator and a Review Committee consisting of three members of the State Board of Bar Examiners before formal charges may be filed against an attorney. Once charges are filed, the formal hearing may be preceded by a prehearing to clarify and limit the issues. The formal hearing itself is conducted much like a trial in that the statutory rules of evidence apply, the respondent may cross-examine the witnesses and present evidence, and the proceedings are recorded by a certified

court reporter. The state has the burden of proving its case by clear and convincing evidence.

If the respondent takes exception to the findings of the panel hearing, the case may be argued before the Supreme Court of Kansas. The parties are allowed to file briefs and the hearing is open to the public. The supreme court hearing is on the merits of the case as supported by the hearing panel record.

Plaintiff alleges that certain of the specific rules mentioned above are unconstitutional. These rules include the denial of extensive discovery, the failure of the hearing panel proceedings to be open to the public, the use of a burden of proof standard less than the criminal standard of beyond a reasonable doubt, the denial of a hearing on the merits, the consideration of Phelps' past discipline by the Supreme Court of Kansas in justifying

the severity of the punishment and the expansion of issues by the Supreme Court to include issues that had not been considered by the hearing panel.

The rules complained of by the Plaintiff do not amount to a denial of due process or equal protection to an attorney in the disbarment process. Plaintiff has not cited a single case that supports his proposition that the denial of extensive discovery is a denial of due process. One court recently considering that issue specifically found that it was not a denial of due process. Matter of Murray, 362 NE 2d 128 (Ind. 1977). In should be noted that even criminal defendants are afforded only the minimum of discovery and that has never been held to be a denial of due process. Palermo v. United States, 360 US 343 (1959), Campbell v. United States, 365 US 85 (1961).

Plaintiff's claim that the procedures of Kansas Supreme Court are secret inquisitorial hearings is mere rhetoric without merit. The panel hearings are now by law open to the public, but were not so at the time of Phelps' hearing. However, the closed nature of the panel hearings as they existed at that time did not deny attorneys due process or equal protection of the law.

In Getty v. Reed, 547 F.2d 971 (6th Cir., 1977) appellant alleged the unconstitutionality of the attorney disciplinary proceedings of the State of Kentucky. The Kentucky proceedings involved in that case provided attorneys with fewer rights than those provided by the Kansas Supreme Court rules. The Kentucky State Bar examiners, pursuant to the rules in effect at that time, reviewed the evidence against the attorney in camera without the attorney

having the right to be present. They then made recommendations to the Kentucky Supreme Court as to the disciplinary action to be taken. The Supreme Court of Kentucky held an open hearing with the attorney present based on the record of the in camera hearing. The Getty court found no significant violation of due process in the rules of the Kentucky Supreme Court.

Although rudimentary requirements of due process must be observed in disciplinary proceedings, there is no requirement for a public hearing. State v. Turner, 538 P.2d 966 (Kan. 1975). Despite this, the plaintiff's final disciplinary proceeding before the Kansas Supreme Court was open to the public, and plaintiff was afforded a public hearing.

Plaintiff alleges constitutional deficiency in the standard of proof required in the Kansas proceedings.

Plaintiff asserts that the disciplinary proceedings should be subject to the criminal standard of proof beyond a reasonable doubt. No authority is given for this proposition. Disciplinary proceedings are unique proceedings. Niles v. Lowe, 407 F.Supp. 132 (D.C. Hawaii, 1976), Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir., 1973). They are not criminal proceedings. In Re Echeles, 430 F.2d 347 (7th Cir., 1970), Yokozeki v. State Bar, 521 P.2d 858 (Cal. 1974), Office of Disciplinary Counsel v. Campbell, 342 A.2d 616 (Penn. 1976), cert. denied, 424 U.S. 926 (1976). We have found no authority for the proposition that the standard of proof in disciplinary proceedings should be beyond a reasonable doubt. Authority does exist for the proposition that proof by clear and convincing evidence is a proper standard. In Re Fischer, 179 F.2d 361 (7th Cir., 1950),

cert. denied, 340 U.S. 825 (1950). In Re Ryder, 263 F.Supp. 360 (E.D.Va., 1967), affirmed 381 F.2d 713 (4th Cir., 1967).

Plaintiff's other contentions that the Kansas Supreme Court Rules are constitutionally deficient are similarly without merit. This Court cannot agree that the Kansas Supreme Court based its discipline on charges that Plaintiff did not have notice of or opportunity to rebut. Plaintiff was given notice of the charges against him and he extensively answered, briefed, and argued each point of contention. Neither can the Court agree that the consideration of Phelps' past disciplinary conduct constituted a denial of due process, equal protection, or any other constitutional right. In Re Echeles, supra, State v. Hoover, 574 P.2d 1377 (Kan. 1978), Silver v. State Bar, 528 P.2d 1157 (Cal. 1974).

As stated above, the essential

requirements of any disbarment proceedings are notice and opportunity to be heard. In Re Echeles, supra. The minimum standard which must be observed in proceedings to revoke or suspend a license to practice law are not identical to nor necessarily as strict as criminal proceedings. In Re Echeles, supra, at page 352. Similarly, a disciplinary proceeding is not a full-blown trial and the attorney need not be provided with all of the protections of a trial. Mildner v. Gulotta, supra, Javits v. Stevens, 382 F.Supp. 131, (D.C.N.Y. 1974), State of Turner, 217 Kan. 575 (1975).

Weighing the three interests to be balanced under a Mathews v. Eldridge, supra, test, the Court finds that the Kansas Supreme Court disciplinary rules meet constitutionally required standards. They sufficiently protect the attorney's interest in practicing law through hearings that

minimize the risk of an erroneous deprivation of such interest, while recognizing the public interest in the regulation of the legal profession. Theard v. U.S., supra.

There are other reasons that the relief requested by the Plaintiff cannot be granted. Injunctive relief is an extra-ordinary remedy and should be granted only under special circumstances. Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319 (2d Cir. 1969), cert. denied, 394 U.S. 999 (1970), Goldammer v. Fay, 326 F.2d 268 (10th Cir. 1964), Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co., 363 US 528 (1960). The granting of injunctive relief is within the sound discretion of the trial judge. Hecht v. Bowles, 321 US 321 (1944), Lemon v. Kurtzman, 411 US 192 (1973).

Federal courts do have the ability to enjoin state court mandates under 42 U.S.C. § 1983 as an exception to the

general prohibition to federal courts enjoining state courts under 28 U.S.C. § 2283, Mitchum v. Foster, 407 U.S. 225 (1972), Henry v. First National Bank of Clarksdale, 595 F.2d 291 (1979), but this is not a situation where it would be proper for this Court to grant such relief. Federal courts should not enjoin the actions of the state courts unless it is absolutely necessary that they do so. Steffanelli v. Minard, 342 US 117 (1951), Rizzo v. Goode, 423 US 362 (1976).

We recognize that the punishment of absolute disbarment is extremely severe, but the Supreme Court of Kansas justified its severity by noting that Plaintiff had previously been suspended. The evidence establishes that past misconduct, which the Kansas Supreme Court had a right to consider as one of many factors before imposing discipline. Resner v. State Bar of California, 349 P.2d 67 (1960).

Discipline of lawyers is a matter clearly within the province of the state courts before which the attorneys are licensed to practice. As such the federal courts must exercise restraint in enjoining the disciplinary rules of the state courts. Younger v. Harris, 401 US 37 (1971), Huffman v. Pursue Ltd., 420 US 592 (1975), Rizzo v. Good, supra, 423 US 362 (1976). To do otherwise would deny the states the integrity, effectiveness, and traditional autonomy of the sovereign court system. Erdmann v. Stevens, 458 F.2d 1205 (2nd Cir., 1972), cert. denied, 409 US 889 (1972), Theard v. U.S., supra, and Cohen v. Hurley, 366 US 117 (1961).

Equitable relief should also be denied if the complainant has failed to exhaust his legal remedies. Beacon Theatre Inc. v. Westover, 359 US 500 (1959). Plaintiff had an adequate remedy at law at the time this case was filed. Kansas

disciplinary procedures are original actions in the Kansas Supreme Court. Rule 212 Discipline of Attorneys, 224 Kan. lxxxvi, Rule 9.01 Appellate Practice, 224 Kan. xlix. As such, Plaintiff could have filed a motion for rehearing or modification of the Order of Disbarment within 20 days. Rule 7.06 Appellate Practice, 224 Kan. xlvii. This would have stayed the order pending the outcome of the issues on review.

In addition, Plaintiff had the right under 28 U.S.C. § 1257(2) or 28 U.S.C. § 1258(3) to petition the Supreme Court of the United States to take the case on appeal or upon writ of certiorari. Plaintiff has failed to exhaust his legal remedies. For the above reasons, the relief requested by the Plaintiff is inappropriate.

The parties having submitted the case to the Court on the merits based on the documents heretofore filed in the action; it is hereby

ORDERED that for the reasons stated above, the Defendants' motion to dismiss is hereby granted; it is further

ORDERED that Plaintiff's Renewed Motion for Stay, Motion for Preliminary Injunction, and Motion for Certification of Class be, and the same hereby is, denied.

Dated this 29th day of October, 1979.

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE

Fred W. PHELPS, Sr.,

Plaintiff-Appellant,

v.

KANSAS SUPREME COURT, et al.,

Defendants-Appellees.

No. 79-2297.

United States Court of Appeals,

Tenth Circuit.

Argued Sept. 15, 1980.

Decided Oct. 5, 1981.

Rehearing Denied Nov. 19, 1981.

Before McWILLIAMS, BREITENSTEIN, and McKAY, Circuit Judges.

APPENDIX "B"

BREITENSTEIN, Circuit Judge.

This civil rights action was brought under 42 U.S.C. § 1983, with jurisdiction asserted under 28 U.S.C. § 1343. Plaintiff-appellant Phelps, a lawyer, was disbarred by the defendant-appellee Kansas Supreme Court. The members of that court and its disciplinary administrator were joined as defendants. Phelps claims that he was denied his constitutional right to due process. The federal district court denied plaintiff's motion for a preliminary injunction and sustained the defendants' motion to dismiss. We affirm.

By stipulation the trial court received and considered the entire record before the Kansas Supreme Court in the disbarment proceedings. State v. Phelps, 226 Kan. 371, 598 P.2d 180, cert. denied, 444 U.S. 1045, 100 S.Ct. 732, 63 L.Ed.2d 731, and also the record on appeal of the Kansas

state court case of Robinson v. Brady. The disbarment proceedings were based on the conduct of the plaintiff in Robinson v. Brady. The pertinent facts are detailed in the opinion of the Kansas Supreme Court, 598 P.2d 180-183, and need not be repeated.

Kansas has comprehensive procedures for the discipline of attorneys. See Rules of the Supreme Court—Discipline of Attorneys—224 Kan. LXXXI et seq., Deft.'s Exs. C & D. Complaints or reports of alleged misconduct are filed with the Disciplinary Administrator who makes recommendations to a Review Panel. If formal disciplinary action is instituted by the Administrator, a complaint is served on the respondent who has opportunity to answer. The Review Panel conducts a hearing after notice. Respondent is entitled to representation, cross-examination of witnesses, and submission of evidence. If the Review Panel recommends discipline, respondent may

present exceptions which are heard by the Kansas Supreme Court. Provision is made for briefing and argument after preparation and service on respondent of a transcript of the hearing before the Review Panel. The court then imposes "such discipline as may be deemed just and proper."

The Review Panel stated the charges against plaintiff as: (1) violation of his attorney's oath; (2) dishonest conduct in violation of DR 1-102(A)(4); (3) conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5); (4) false statements in violation of DR 7-102(A)(5); and (5) signing a pleading in bad faith in violation of Kansas statute KSA 60-211. The Review Panel found violations of items (2) through (5) and recommended public censure.

On plaintiff's exceptions to the report of the Review Panel the Kansas Supreme Court said, 598 P.2d at 186:

> "We have carefully and painstakingly reviewed the voluminous transcripts and exhibits and conclude there is clear and convincing evidence to support the panel's finding that respondent violated [the four items mentioned above]."

The Supreme Court also said, Id. at 187:

> "Additionally, we find the entire record before us clearly supports a violation of DR 7-102 (A)(1)."

The last mentioned disciplinary provision says that a lawyer shall not take action on behalf of a client "when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." After noting that plaintiff had been previously suspended from law practice, because of unprofessional conduct in 1969, see 598 P.2d 187, the court changed the penalty from that

recommended by the Review Panel to that of disbarment. This action was in accord with an earlier ruling that the recommendations of the Review Panel "are advisory only and not binding on this court." State v. Johnson, 219 Kan. 160, 546 P.2d 1320, 1322.

Plaintiff claims that the action of the Kansas Supreme Court finding a violation of a disciplinary standard not charged in the proceedings before the Review Panel deprived him of due process because he had no notice of, or opportunity to defend against, that specific charge. In taking its action the Kansas court had before it, and considered, only the evidence adduced in support of the violations charged in the complaint before the Review Panel. That evidence was confined to the misconduct of the plaintiff in the Robinson v. Brady litigation. The case at bar is distinguishable from In Re Ruffalo, 390 U.S. 544,

88 S.Ct. 1222, 20 L.Ed.2d 117. That case involved two different, distinct, and unrelated incidents of misconduct and the respondent lawyer had notice only of one. We are concerned with one continued and integrated pattern of misconduct, plaintiff's actions in the Robinson v. Brady litigation. Plaintiff had full knowledge that his actions in that litigation were the basis for the disciplinary proceedings and full opportunity to present his defense. The Kansas court concluded that the misconduct in Robinson v. Brady violated another ethical standard in addition to the standards considered by the Review Panel.

[1] Plaintiff argues that the district court erred in granting the defendants' motion to dismiss. The record shows that the case was heard on its merits with stipulated evidence. The lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings.

Selling v. Radford, 243 U.S. 46, 50, 37 S.Ct. 377, 378, 61 L.Ed. 585; Doe v. Pringle, 10 Cir., 550 F.2d 596, 599, see also, Theard v. United States, 354 U.S. 278, 282, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342. The United States Supreme Court reviews state disciplinary proceedings on appeal from and on certiorari to the state supreme court. See e. g. Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444; Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574. Certiorari was sought and denied in this case. 444 U.S. 1045, 100 S.Ct. 732, 62 L.Ed.2d 731.

[2] We have recognized the difference between a particularized attack on state action affecting an individual attorney and an attack on the state's general rules and regulations pertaining to the law practice. Younger v. Colorado State Board of Law Examiners, 10 Cir., 625 F.2d 372, 375-376. In the case at bar plaintiff attacks the

general rules and their application to him. The district court held that the general rules were constitutional and we agree. The attack on these rules borders on the frivolous.

The question is the application of those rules to plaintiff. In effect the district court held that the rules were not unconstitutionally applied. Hence, there was no deprivation of a constitutional right and a claim could not be sustained under § 1983.

The Kansas Supreme Court could have disbarred Phelps on any one of the charges heard and considered by the Review Panel and sustained by the court. The issue narrows to whether, by finding plaintiff in violation of an ethical standard not specified in the complaint against him, the disbarment must fail because of denial of due process. On the other charges, plaintiff does not assert a due process claim. Indeed, he cannot because he had notice and full

opportunity to be heard.

The record does not disclose whether plaintiff raised the due process claim on the additional charge either by way of petition for rehearing to the Kansas Supreme Court or in his petition to the Supreme Court of the United States for certiorari review. Under Kansas Disciplinary Rule 219(a) he could have, and still can, apply for reinstatement by showing that "he has rehabilitated himself or that he is entitled to have the order of discipline vacated, terminated or modified." (Emphasis supplied.) Instead of doing so he sought § 1983 relief in federal court. We doubt whether § 1983 relief is available when a complainant does not exhaust the state remedy which is available to him. The United States Supreme Court has not decided this issue. See e. g. Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 415 n. 5, 66 L.Ed.2d 308. We decline to decide it here because the case can be

disposed of on other grounds.

The Kansas court found one statutory and three ethical standard violations. Any one of these sufficed to sustain the disbarment sanction. These violations were free from any claim of unconstitutionality. Plaintiff says that the disbarment must be enjoined because on the same evidence the court found violation of another ethical standard, and in so doing deprived plaintiff of his due process right. We disagree.

[3] In the criminal law field, the Supreme Court has held that when several concurrent sentences are within the legal maximum and not legally deficient, a court in the exercise of its judicial discretion may decline to consider a separate charge which may not be legally supportable. See Roviaro v. United States, 353 U.S. 53, 59 n. 6, 77 S.Ct. 623, 627, 1 L.Ed.2d 639; and Barnes v. United States, 412 U.S. 837, 841, 93 S.Ct. 2367, 2360, 37 L.Ed.2d 380.

The Court has applied the same principle when a trial on several counts is followed by a general sentence. That sentence may be upheld if conviction on any one of the counts is supportable. Barenblatt v. United States, 360 U.S. 109, 115, 79 S.Ct. 1081, 1087, 3 L.Ed.2d 1115.

Benton v. Maryland, 395 U.S. 784, 789-790, 89 S.Ct. 2056, 2059-2060, 23 L.Ed.2d 707, says that the concurrent sentence doctrine does not remove the elements needed to create a justiciable controversy and points out the possibility of adverse collateral effects. No decision since Benton changes or modifies its discussion of the concurrent sentence principle. See e. g. Barnes v. United States, supra, and Andresen v. Maryland, 427 U.S. 463, 469 n. 4, 96 S.Ct. 2737, 2742, 49 L.Ed.2d 627.

[4] Plaintiff claims no collateral effects arising out of the Kansas court's holding that he violated an ethical standard

which was not charged, and the record shows none. The evidence supporting the additional violation is the same as that supporting the other ethical violations. We assign no importance to the court's enhancement of the sanction from public censure to disbarment. That court noted plaintiff's previous suspension for unprofessional conduct and said that the seriousness of the instant case "coupled with his previous record leads this court to the conclusion that respondent [Phelps] has little regard for the ethics of his profession." 598 P.2d at 187. We agree. On the record presented and in the exercise of our judicial discretion we decline to consider plaintiff's due process claim.

We have noted the opinion of this court in No. 81-1022—In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., 637 F.2d 171 (10th Cir.). Although that case involved the same lawyer as is

now before us, it was concerned with his suspension in the United States District Court for the District of Kansas. The suspension was affirmed. The court commented in passing that the district court had correctly held that the action of the Kansas court in considering the additional charge violated due process. The statement was unnecessary to that decision and was supported by citation to In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117. See 637 F.2d at 174. As we have said earlier, Ruffalo is not in point because it involved two distinct incidents, only one of which was charged. The instant case involves several charges growing out of the same incident, the Robinson v. Brady litigation. We are convinced that the obiter dictum in No. 81-1022, 637 F.2d 171, in no way inhibits our discretion to sustain the disbarment on the ethical violations which are free from constitutional objections.

Affirmed.

McKAY, Circuit Judge, dissenting:

When the Kansas Supreme Court reviewed the charges, record and recommendations of the disciplinary committee in this case, it rejected the committee's recommendation of public censure and instead ordered that plaintiff be disbarred. State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied, 444 U.S. 1045, 100 S.Ct. 732, 62 L.Ed.2d 731 (1980). In doing so the court added a charge not made or briefed prior to that court's opinion.[1] In addition

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1. A panel of the State Board of Law Examiners recommended public censure of the appellant based only on charges other than DR7-102(A)(1). The Kansas Supreme Court sustained the findings of the Board and concluded: "Additionally, we find the entire record before us clearly supports a violation of DR7-102(A)(1)." State v. Phelps, 598 P.2d at 187. Without segregating the DR7-102(A)(1) violation from the other charges, the court decided to disbar rather than censure appellant.

to this dissenter, three other judges of this court have in a prior opinion indicated their agreement with this assessment.[2] In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., 637 F.2d 171 (10th Cir. 1981). I do not understand the majority to deny this unavoidable characterization of the proceedings below. In what amounts to a kind of "harmless error" approach to the matter, the majority has minimized the importance of the uncharged and unbriefed issue in

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2. After reviewing the same record before the Kansas Supreme Court in connection with a federal court disciplinary proceeding, a unanimous three-judge panel concluded:

> The district court correctly held that the defendant has been deprived of his rights under the due process clause in accordance with In Re Ruffalo, 390 U.S. 544 [88 S.Ct. 1222, 20 L.Ed.2d 117] (1968), when the state court found him guilty of violating DR7-102 A 1, the charge in which he had not been given notice.

In re Phelps, 637 F.2d 171, 174 (10th Cir. 1981).

the Kansas Supreme Court decision and disregarded the recommendation of its own bar association disciplinary panel in order to impose the penalty of loss of license and livelihood. In this I respectfully cannot join. In fact it is the uncharged violation which seems to be the focal point of the Kansas Supreme Court decision. That court seemed compelled to rely on the uncharged violation to justify its greatly escalated penalty.

The majority's obiter dictum analogy to cumulative sentencing really does not support their opinion. This is not a case where one illegal sentence does not increase the overall length of the sentence lawfully meted out on another count in the same trial. Rather, this case is one in which notice and an opportunity to be heard were absent as to one key element relied upon to justify a single sentence. We have no way of knowing what the Kansas Supreme Court would

have done had this issue not been superimposed on the properly charged and briefed issues. At the very least it would do an injustice to that court's opinion to suggest that it did not consider this element very important in its decision to drastically increase the penalty over the one solemnly recommended by the bar after full hearing.

I simply do not understand the majority's attempt to distinguish In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The majority described plaintiff's actions in the Robinson v. Brady[3] case as "one continued and integrated pattern of misconduct" while characterizing Ruffalo's actions as two "distinct and unrelated incidents of misconduct." The important

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3. Nos. 125695 and 125742 (Dist. Ct., Shawnee County, Kan. 1976), aff'd, No. 48,949 (Kan.Ct.App. Feb. 17, 1978).

point is that in both cases the lawyers did not have notice of or an opportunity to be heard on one of several charges relied upon to justify disbarment. It is not enough, as the majority states, that the lawyer have "full knowledge that his actions . . . [are] the basis for the disciplinary proceedings." What is required by the Due Process Clause is notice of the charges so that an adequate defense may be prepared. The charge of which notice was lacking—DR 7-102(A)(1)—condemns conduct of a different nature than that properly charged under other sections of the Code and under state law. Plaintiff was constitutionally entitled to an opportunity to defend against that charge as well as the charges properly brought against him.

Disbarment proceedings are quasi-criminal in nature. In Re Ruffalo, 390 U.S. at 551, 88 S.Ct. at 1226. Because a lawyer's livelihood is at stake, courts often

require clear and convincing evidence of misconduct. McCormick's Handbook of the Law of Evidence, § 341 n. 22 (2d ed. 1972). This elevated standard of proof reflects the magnitutde of the liberty interest threatened. Because of the quasi-criminal nature of these proceedings, an analogy to the criminal law is appropriate. A court that would affirm this case would logically also sustain a conviction for kidnap apparently committed during a bank robbery where only robbery was charged and tried. As in Ruffalo, I must conclude that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [plaintiff] of procedural due process." In re Ruffalo, 390 U.S. at 552, 88 S.Ct. at 1226.

The only remaining question is whether an attorney disbarred in a state court proceeding may bring in federal district court a "suit in equity" under 42 U.S.C.

§ 1983[4] to enjoin an Order of Disbarment when that order was, in part, based on proceedings which violate the due process clause of the fourteenth amendment.[5]

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4. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

5. There is no claim for damages in this case, which in any event would be barred by doctrines of judicial immunity. See Slavin v. Curry, 574 F.2d 1256, 1266 (5th Cir. 1978) (also holding that such "immunity does not extend to immunity from equitable relief"). Additionally, we are not faced with the problems raised in Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), since appellant has exhausted his state appellate remedies and the state proceedings are now concluded. See Huffmann v. Pursue, Ltd., 420 U.S. 592, 607-10, 95 S.Ct. 1200, 1209-1211, 43 L.Ed.2d 482 (1975); Gipson v. New Jersey Supreme Court, 558 F.2d 701, 704 (3rd Cir. 1977).

The Supreme Court has said:

It is not for this Court, except within the narrow limits for review open to this Court, as recently

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See also American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir.), cert. denied, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). We do not think that Younger required appellant to file a petition for rehearing with the Kansas Supreme Court, see Kan. Stat. § 60-2701a, Rule No. 7.06 (1976). The disciplinary proceedings are final and are not longer "pending" against petitioner so as to invoke Younger's noninterference rationale.

The Supreme Court has yet to decide how principles of res judicata apply to civil rights litigation. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 415 n. 5, 66 L.Ed.2d 308 (1980). In any event, appellant's claim cannot be barred by principles of res judicata. Appellant was unaware of his claim until after the state proceedings were concluded when he first learned of the DR7-102 (A)(1) charge. Appellant thus had no opportunity to present his due process claim to a state tribunal in normal appellate processes. The Supreme Court has held that principles of collateral estoppel apply to § 1983 actions: "There is, in short, no reason to believe that Congress

> canvassed in Konigsberg v. California, 353 U.S. 252 [77 S.Ct. 722, 1 L.Ed.2d 810], and Schware v. Board of Bar Examiners, 353 U.S. 232 [77 S.Ct. 752, 1 L.Ed.2d 796], to sit in judgment on [state court] disbarments . . . .

Theard v. United States, 354 U.S. 278, 281, 77 S.Ct. 1274, 1276, 1 L.Ed.2d 1342 (1957). Theard was a federal disbarment proceeding and did not directly review the state proceedings. Konigsberg and Schware involved petitions for certiorari from the state proceedings directly to the Supreme Court. Unfortunately, no Supreme Court decision directly deals with an original § 1983 proceeding where a violation of the type reviewed in Konigsberg and Schware

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> intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court . . . ." Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 420, 66 L.Ed.2d 308 (1980). Nonetheless, appellant's claim is not barred by principles of collateral estoppel because it has not been presented to or passed upon by the state courts.

is alleged. Broad language from some circuit cases suggests that certiorari to the Supreme Court is the only method of review of state disciplinary proceedings, but none explicitly prohibits a § 1983 injunctive action alleging that the rules of state disciplinary proceedings or their administration violate fundamental due process.[6]

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6. See Martinez Rivera v. Trias Monge, 587 F.2d 539 (1st Cir. 1978); Grossgold v. Supreme Court of Illinois, 557 F.2d 122 (7th Cir. 1977); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977); Mayes v. Honn, 542 F.2d 822, 824 (10th Cir. 1976) ("if the [§ 1983 challenge to a state disbarment] was a bona fide civil rights action which showed some promise of success . . . it might be that the fact that it also collaterally attacks proceedings in the state court would not be significant"); Feldman v. State Bd. of Law Examiners, 438 F.2d 699 (8th Cir. 1971); McKay v. Nesbett, 412 F.2d 846 (9th Cir.), cert. denied, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969); Jones v. Hulse, 391 F.2d 198 (8th Cir.), cert. denied, 393 U.S. 889, 89 S.Ct. 206, 21 L.Ed.2d 167 (1968).

In Ginger v. Circuit Court, 372 F.2d 621 (6th Cir. 1967), the court stated that "the limits of review [by the

In a § 1983 challenge to Colorado's rules governing admission to that state's bar, this court recently said:

> We have held that the federal district courts may not exercise jurisdiction to review an adjudication by the state courts which is alleged to have unlawfully denied admission to a particular applicant for admission to the bar . . . . However, our decision in Doe [v. Pringle, 550 F.2d 596 (10th Cir. 1976), cert. denied, 431 U.S. 916, 97 S.Ct. 2179, 53 L.Ed.2d 227 (1977)] does recognize a distinction between a frustrated bar applicant's challenge to the denial of his particular petition and a constitutional attack on a state's general rules and regulations governing admission (550 F.2d at 599).

> United States Supreme Court] are violations, in the course of disbarment proceedings, of the due process or equal protection clauses of the Fourteenth Amendment, and a petition for Writ of Certiorari to the Supreme Court of the United States is the only method by which review may be had." Id. at 625. The Sixth Circuit narrowed this "holding" in Getty v. Reed, 547 F.2d 971 (6th Cir. 1977): "These cases do . . . stand for the proposition that the District Court has no appellate jurisdiction as to final

Younger v. Colorado State Board of Law Examiners, 625 F.2d 372, 375-76 (10th Cir. 1980). This same distinction exists between challenges to a particular disciplinary proceeding and a constitutional attack on a state's general rules and regulations governing discipline. Appellant's complaint constitutes the latter type of attack; it specifically challenges the disciplinary rules of the Kansas Supreme Court which, as applied here, allow for the disbarment of an attorney based partially on a charge which that attorney has not been notified of or allowed to respond to.

Section 1983 explicitly provides for suits in equity where a citizen has been deprived of any "rights, privileges, or

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decisions of a state supreme court or, a fortiori, the United States Supreme Court. However, the instant complaints are original claims which allege state law violation of the Federal Constitution." Id. at 974 (emphasis added).

immunities secured by the Constitution and laws." Absent a clear holding that § 1983 was not designed to redress a denial of due process by a state supreme court's application of its statutes, ordinances, regulations, customs, or usages, we are not at liberty to disregard the congresionally created cause of action. While it is true that a petition for certiorari provides an avenue of relief from unconstitutional state disbarment proceedings, § 1983 provides an independent basis for such actions in the federal district courts. This action is analogous to the situation which exists in criminal cases, where a party can bring a petition for certiorari directly in the Supreme Court but is not thereby precluded from bringing a separate petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[7]

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7. Cf. Huffmann v. Pursue, Ltd., 420 U.S. 592, 605-07, 95 S.Ct. 1200, 1208-

The Order of Disbarment was in part based on a charge of which appellant had neither notice nor an opportunity to be heard, both of which are mandated by the fourteenth amendment. Consequently, I believe the district court erroneously dismissed this § 1983 action.[8] What the state court would have done had the charge of violation of DR 7-102(A)(1) been excluded, or had appellant been accorded notice of and an opportunity to respond to it, we do not know. The trial court should have entertained the action and entered an order declaring the challenged procedure unconstitutional and enjoining the disbarment order

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1209, 43 L.Ed.2d 482 (1975). None of the Supreme Court's concerns about res judicata and collateral estoppel, id. at 606 n. 18, 95 S. Ct. at 1209, are present here. See note 5 supra.

8. Appellant raises other challenges to the state proceedings, but, like the majority, I find no infirmity cognizable under § 1983 in the challenges raised.

as it now stands infected with unconstitutional proceedings.[9] I hasten to add that I would not prohibit the Kansas Supreme Court from taking such constitutional proceedings and actions as it subsequently may determine are proper in this case.

I would reverse and remand for the entry of an appropriate order consistent with these views.

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9. Such an injunction is not barred by the Anti-Injunction Act, 28 U.S.C. § 2293. See Mitchum v. Foster, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

NOVEMBER TERM - November 19, 1981

Before Honorable Oliver Seth, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Jean S. Breitenstein, Circuit Judges.

FRED W. PHELPS, SR., Plaintiff-Appellant, vs. THE KANSAS SUPREME COURT, THE HONORABLE ALFRED G. SCHROEDER, THE HONORABLE ALEX M. FROMME, THE HONORABLE DAVID PRAGER, THE HONORABLE ROBERT H. MILLER, THE HONORABLE RICHARD M. HOLMES, THE HONORABLE KAY McFARLAND, and THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court; and THE STATE OF KANSAS, Defendants-Appellees. KANSAS BAR ASSOCIATION, Amicus.	)	No. 79-2297

APPENDIX "C"

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted. Circuit Judge McKay voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS, Clerk

By /s/ Robert L. Hoecker
Robert L. Hoecker
Chief Deputy Clerk

Opposition

FILED
APR 6 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1411

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRED W. PHELPS, SR., Petitioner

v.

THE KANSAS SUPREME COURT; THE HONORABLE ALFRED G. SCHROEDER; THE HONORABLE ALEX M. FROMME; THE HONORABLE DAVID PRAGER; THE HONORABLE ROBERT H. MILLER; THE HONORABLE RICHARD M. HOLMES; THE HONORABLE KAY McFARLAND; THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity As Disciplinary Administrator of the Kansas Supreme Court; and THE STATE OF KANSAS, Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

April 2, 1982

QUESTIONS PRESENTED FOR REVIEW

I. Should This Court Consider In A Civil Rights Action The Identical Issues It Declined To Review When Presented By Fred W. Phelps, Sr., In A Prior Petition For Certiorari To This Court, State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied, 444 U.S. 1045 (1980)?

II. May A Disbarred Attorney Bring A Civil Rights Action For Declaratory And Injunctive Relief Without First Exhausting The Adequate State Remedies Available To Him For Relief?

III. Whether Fred W. Phelps, Sr.'s Disbarment Should be Reviewed When Seven State Supreme Court Judges and Eight Federal Judges Found That He "Has Little Regard For The Ethics Of His Profession" Or That "The Members Of This Court Are Unanimous In Their Belief That The Public Interest Requires Cessation Of Respondent's Privilege To Practice Law In The Federal Courts."

IV. Did The Tenth Circuit Court Of Appeals Err When It Held That Lower Federal Courts Do Not Have Subject Matter Jurisdiction To Review State Disbarment Proceedings, Even As An Alleged Civil Rights Violation?

V. Did The Tenth Circuit Court Of Appeals Err When It Upheld The Disbarment Of Fred W. Phelps, Sr., By The Kansas Supreme Court?

VI. Did The Tenth Circuit Court Of Appeals Err When It Held The Kansas General Rules and Regulations Pertaining To The Practice Of Law To Be

Constitutional and Fred W. Phelps' Attack On Those Rules To Border On The Frivolous?

VII. Did The Tenth Circuit Court Of Appeals Err When It Held Fred W. Phelps, Sr. Had Full Knowledge That The Robinson v. Brady Litigation Was The Basis Of His Disciplinary Proceeding, During Which He Had Full Opportunity To Present His Defense To The One Continued And Integrated Pattern Of Misconduct As Shown In That Trial Record?

VIII. Did The Tenth Circuit Court of Appeals Err When It Upheld The State's Disbarment And The Federal Two-Year Suspension Of Fred W. Phelps, Sr., When The State Disciplinary Hearing Panel Had Recommended Public Censure?

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OPINIONS BELOW

To avoid confusion, Respondents would call to the Court's attention three separate but connected cases involved in this present action.

I.
THE STATE DISBARMENT ACTION

The original action was a proceeding conducted by the Kansas State Board of Law Examiners which filed its report, findings, and recommendations with the Kansas Supreme Court on February 12, 1979, pursuant to Supreme Court Rule 212. (224 Kan lxxxvi-lxxxvii.) [A copy of the panel report is attached as Appendix A to this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.]

The Kansas Supreme Court, after a hearing and considering the Board of Law Examiners report and record, the exceptions of Fred W. Phelps, Sr., and the briefs and arguments of counsel, ordered

Fred W. Phelps, Sr., disbarred. State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied, 444 U.S. 1045, 62 L.Ed. 731, 100 S.Ct. 732 (1980). [A copy of 226 Kan. 371 (1979) is attached as Appendix B to this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.]

Fred W. Phelps, Sr., never filed a motion for rehearing or modification of the Kansas Supreme Court opinion, pursuant to Supreme Court Rule 7.06 (224 Kan. xlvii), nor has petitioner ever filed a verified petition for reinstatement to the practice of law, pursuant to Supreme Court Rule 219 (224 Kan. lxxxix).

Fred W. Phelps, Sr., did file in Case No. 79-732 in the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of Kansas presenting basically the same legal issues presented in the instant action. This Court denied

certiorari at 444 U.S. 1045, 62 L.Ed.2d 731, 100 S.Ct. 732 (1980).

II.
THE CIVIL RIGHTS ACTION

The second connected suit is the instant action. It was filed as a federal civil rights action on July 31, 1979, seeking declaratory and injunctive relief to the effect that the Rules of the Kansas Supreme Court relative to the Discipline of Attorneys were unconstitutional; that they were unconstitutional as applied to Fred W. Phelps, Sr.; and that his disbarment order should not be enforced because his constitutional rights were violated.

A trial on the merits of the action was held before the Honorable Clarence A. Brimmer at Wichita, Kansas, on August 10, 1979.

On October 31, 1979, by order and judgment dismissing action, the district court denied all relief to Fred W. Phelps, Sr. Fred W. Phelps, Sr., v. The

Kansas Supreme Court, et al., Case No. 79-1381, Brimmer, J., unpublished order and judgment dismissing action, 10-31-79 (D.C. Kan. 1979). (See Appendix A of the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.)

Appeal to the Tenth Circuit Court of Appeals followed Judge Brimmer's denial of Fred W. Phelps, Sr.'s, motion to alter or amend judgment. Fred W. Phelps, Sr., v. Kansas Supreme Court, et al., Case No. 79-1381, Brimmer, J., unpublished order, 12-10-79 (D.C. Kan. 1979).

The Tenth Circuit Court of Appeals considered the appeal of Fred W. Phelps, Sr., and affirmed the district court's decision on October 5, 1981. Phelps v. Kansas Supreme Court, 662 F.2d 649 (10th Cir. 1981). (See Appendix B of petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.)

On November 19, 1981, the Tenth Circuit denied Fred W. Phelps, Sr.'s, petition for rehearing and suggestion for rehearing in banc. (See Appendix C of petitioner's Petition for Writ of Certiorari to the United States Court of Appeal for the Tenth Circuit.)

The present petition for certiorari to this Court followed on January 27, 1982.

III.
THE FEDERAL SUSPENSION ACTIONS

The third connected case is In The Matter Of The Disciplinary Proceedings Of Fred W. Phelps, Sr., filed originally as Case No. 80-1001-A in the United States District Court, Wichita, Kansas, and subsequently changed to Case No. 80-1152. That case originated with an order of January 2, 1980, directing Fred W. Phelps, Sr., to show cause why he should not be disbarred in federal district court. After receiving a written response to the district court's order

and hearing the matter during which Fred W. Phelps, Sr., was allowed to present testimony of witnesses, including himself, as well as the arguments and briefs of counsel, the three-judge district court rendered its opinion. On November 3, 1980, the Court suspended Fred W. Phelps, Sr., from the practice of law in the United States District Court for the District of Kansas for a period of two years from December 3, 1980. In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., unpublished opinion and order of the Court, Theis, Saffels, and Stanley, JJ., Case No. 80-1152, 11-3-80 (D.C. Kan. 1980). [A copy is attached as Appendix C to this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.]

The decision of the three-judge district court was appealed to the Tenth Circuit Court of Appeals where it was consol-

idated with a disciplinary action then pending in that Court against Fred W. Phelps, Sr., 10th Cir., Case No. Misc. 80-8008. The Tenth Circuit Court of Appeals affirmed the district court on February 27, 1981, Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981), rehearing denied April 8, 1981. [A copy of this opinion is attached as Exhibit D to this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.]

On the same date, the Tenth Circuit Court of Appeals issued its judgment against Fred W. Phelps, Sr., in its own disciplinary action, suspending him from practice before the Tenth Circuit Court of Appeals for two years from February 27, 1981. In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., unpublished judgment, Case No. 81-1022, consolidated with Misc.

Case No. 80-8008, (10th Cir. 2-27-81). (A copy of this judgment attached as Appendix E to this Brief in Opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.)

No appeal or petition for writ of certiorari was ever taken from these judgments of the Tenth Circuit Court of Appeals.

Fred W. Phelps, Sr., did file on June 9, 1981, in Case No. 80-1152 in the United States District Court for the District of Kansas a motion to modify opinion and order of November 3, 1980, or in the alternative, petition to reinstate pursuant to local rule 4A(VII). The same three-judge district court denied Fred W. Phelps, Sr.'s, motion and petition on November 30, 1981, and his motion for reconsideration on January 22, 1982. That decision has been appealed to the Tenth Circuit Court of Appeals as Case No.

82-1129 where it presently awaits a briefing schedule.

STATEMENT OF CASE

A formal complaint was filed on December 8, 1977, before the Kansas State Board of Law Examiners against Fred W. Phelps, Sr., concerning his misconduct in the trial of a case in the District Court of Shawnee County, Kansas, entitled Robinson v. Brady, Case No. 125742 (Kan. St. D.C. 1976).

The hearing panel of the State Board of Law Examiners determined that the issues to be heard by the panel were:

> "3. The panel chairman then states it is his opinion and he rules that the issue in this case is as to whether the Respondent made false statements to the court in his proffered testimony and in his Motion for a New Trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in Paragraphs 1a, 1b and 1c of the complaint. The panel chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the hearing panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of

the proferred witnesses; more particularly the issues will be as to whether or not the Respondent violated

1. His oath as an attorney

2. DR 1 - 102A4 - "Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation"

3. Did he violate DR 1-102A5 - "Engage in Conduct that is Prejudicial to the Administration of Justice and

4. Did he violate DR 7-102A5 - "Knowingly Make False Statements of Fact or Law" and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?" [Appendix A, pp. 3, 4, as attached to this Brief in Opposition.]

A formal hearing was held by the panel on March 13, 14, and 15, 1978. A fact often forgotten throughout all these legal proceedings is that Fred W. Phelps, Sr., himself requested the entire record and transcript of the Robinson v. Brady case be admitted as evidence before the hearing panel, not the State. They were admitted by the hearing panel and thus

were subsequently available for review by the Kansas Supreme Court and the federal courts. The panel issued its Panel Report on January 20, 1979, which was filed with the Kansas Supreme Court on February 12, 1979. The panel found Fred W. Phelps, Sr., by his conduct had violated three separate disciplinary rules and one Kansas statute, to-wit: DR 1-102(A)(4), DR 1-102(A)(5), DR 7-102(A)(5), and K.S.A. 60-211. The hearing panel recommended to the Kansas Supreme Court that Fred W. Phelps, Sr., be disciplined by public censure. [See Appendix A, p. 34, this Brief in Opposition.]

Neither the hearing panel nor the Kansas State Board of Law Examiners has the power to discipline any attorney, except by way of informal admonition. Only the Kansas Supreme Court in its own independent judgment after a full hearing may impose the disciplines of disbarment, suspension, or public censure as may be

just and proper. (See Rules 203, 211, and 212, Rules of the Supreme Court, 224 Kan. lxxxi, lxxxii, lxxxv, lxxxvi, lxxxvii.)

The Kansas Supreme Court hearing provided Fred W. Phelps, Sr., with a full opportunity to respond and defend by way of exceptions, briefs, and oral arguments. The Kansas Supreme Court carefully and painstakingly reviewed the voluminous transcripts and exhibits and concluded Fred W. Phelps, Sr., had, in fact, violated DR 1-102(A)(4), DR 1-102(A)(5), DR 7-102(A)(5), and K.S.A. 60-211. The Kansas Supreme Court could have disciplined Fred W. Phelps, Sr., by disbarment for any single one of his four ethical violations.

Based upon the record before them, including the full record and transcripts of the Robinson v. Brady trial, as put into evidence by Fred W. Phelps, Sr., the Supreme Court made an additional finding from the Fred W. Phelps, Sr., exhibit,

holding:

> In addition, a study of the transcripts, particularly that of the trial of Robinson v. Brady, convinces us that Fred W. Phelps, Sr. meant it when he told Carolene Brady he had wanted to sue her for a long time. The trial became an exhibition of a personal vendetta by Phelps against Carolene Brady. His examination was replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant. We note the panel's discussion of DR 7-102(A)(1) and its observation that the record and testimony show "a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his client and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon." (Emphasis added.) The panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states: "That the Motion for New Trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact." We have examined the record and transcripts from Robinson v. Brady, which were made exhibits by the panel and are properly before this court as part of the record in the disciplinary case. This record unquestionably supports a finding

> that Phelps' action in filing the motion for new trial attempted to hold Mrs. Brady up to unnecesary public ridicule. Additionally, we find the entire record before us clearly supports a violation of DR 7-102(A)(1). (226 Kan. 379.)

The acts done by Fred W. Phelps, Sr., violated the Code of Professional Responsibility and K.S.A. 60-211. They showed a callous disregard of his oath as an attorney. By his conduct, Fred W. Phelps, Sr., forfeited his privilege to practice law in Kansas. The Kansas Supreme Court disbarred Fred W. Phelps, Sr., on July 20, 1979. [226 Kan. 371, 381 (1979).]

Fred W. Phelps, Sr., has never to this date filed a verified petition for reinstatement, showing he has rehabilitated himself or that he is entitled to have the order of discipline vacated, terminated, or modified, pursuant to Supreme Court Rule 219 (224 Kan. lxxxix). Fred W. Phelps, Sr., has never filed a pleading with the Kansas Supreme Court

stating he believed their opinion to contain any error or to have violated any of his constitutional rights.

Fred W. Phelps, Sr., has sought relief elsewhere. He did file in the United States Supreme Court a Petition for Writ of Certiorari to the Supreme Court of Kansas which presented, substantially, the same allegations and legal issues presented in his instant petition for certiorari. This Court denied that petition at 444 U.S. 1045, 62 L.Ed.2d 731, 100 S.Ct. 732 (1980).

In addition, on July 31, 1979, eleven (11) days after his disbarment, Fred W. Phelps, Sr., filed the present case in United States District Court for the District of Kansas, at Wichita, Kansas. This case was filed as a civil rights action seeking declaratory and injunctive relief to the effect that the Rules of the Kansas Supreme Court Relating to Discipline of Attorneys (224

Kan. lxxxi through xcii) were unconstitutional; that they were unconstitutional as applied to Fred W. Phelps, Sr., by the Kansas Supreme Court, and that the order of disbarment against him should not be enforced, because his constitutional rights had been violated.

All federal judges in Kansas recused themselves from hearing the action. The Honorable Clarence A. Brimmer, Chief Judge for the District of Wyoming, was designated trial judge by the Tenth Circuit Court of Appeals. Trial on the merits of the action was held on August 10, 1979, in Wichita, Kansas.

On October 31, 1979, Judge Brimmer issued his order and judgment dismissing the action. Phelps v. Kansas Supreme Court, et al., unpublished order and judgment, Brimmer, J., Case No. 79-1381, 10-31-79, (D.C. Kan. 1979). (See Appendix A of petitioner's Petition for Writ of Certiorari to the United States

Court of Appeals for the Tenth Circuit.)

Judge Brimmer found that a close reading of Fred W. Phelps, Sr.,'s civil rights action shows that the true purpose of the action was to have the federal district court review his disbarment proceedings in the Kansas Supreme Court. The district court clearly observed why the action was brought under the civil rights laws, saying:

> The necessity for this type of attack is evident. The United States Supreme Court and the lower federal courts have held numerous times that the lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts. . . . This is true even though the state court proceedings are alleged to have been constitutionally deficient. (Petitioner's Appendix A, p. 11.)
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> . . . .
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> The civil rights statutes may not be read as asserting a new form of federal review between the appellate courts of the states and the United States Supreme Court. (Petitioner's Appendix A, p. 12.)
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> . . . .
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> However, the court in Doe v. Pringle, supra, acknowledged that the situation is different when the complainant asserts due process or

> equal protection deprivations in the adoption and/or administration of general rules and regulations governing admission and discipline. This Court does have the ability to determine the Plaintiff's allegations that the rules of the Kansas Supreme Court are unconstitutional as generally written and administered. (Petitioner's Appendix A, pp. 13, 14.)
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> . . . .
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> A review of the Kansas disciplinary rules and the way in which they are applied shows that they provide more than adequate due process and equal protection. (Petitioner's Appendix A, p. 16.)

The district court then discussed many of the allegations of unconstitutionality raised by Fred W. Phelps, Sr., saying, in part:

> Plaintiff's other contentions that the Kansas Supreme Court Rules are constitutionally deficient are similarly without merit. This Court cannot agree that the Kansas Supreme Court based its disciplinary action on charges that Plaintiff did not have notice of or opportunity to rebut. Plaintiff was given notice of the charges against him and he extensively answered, briefed, and argued each point of contention. Neither can the Court agree that the consideration of Phelps' past disciplinary conduct constituted a denial of due process, equal protection, or any other constitutional right. (Petitioner's Appendix A, p. 22.)
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> . . .

> Weighing the three interests to be balanced under a Mathews v. Eldridge, supra, test, the Court finds that the Kansas Supreme Court disciplinary rules meet constitutionally required standards. They sufficiently protect the attorney's interest in practicing law through hearings that minimize the risk of an erroneous deprivation of such interest, while recognizing the public interest in the regulation of the legal profession. (Petitioner's Appendix A, pp. 23, 24.)
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> . . .
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> Discipline of lawyers is a matter clearly within the province of the state courts before which the attorneys are licensed to practice. As such the federal courts must exercise restraint in enjoining the disciplinary rules of the state courts. . . . To do otherwise would deny the states the integrity, effectiveness, and traditional autonomy of the sovereign court systems. (Petitioner's Appendix A, p. 26.)

The district court discussed other reasons for not granting the relief requested by Fred W. Phelps, Sr., and ordered the complaint and cause be dismissed with prejudice. (Petitioner's Appendix A.)

The district court's decision was appealed to the Tenth Circuit Court of

Appeals which, after briefing and oral arguments, rendered its decision on October 5, 1981. Phelps v. Kansas Supreme Court, et al., 662 F.2d 649 (10th Cir. 1981), rehearing denied 11-19-81. [Petitioner's Appendix B.]

In the meantime, a three judge federal district court of Kansas had suspended Fred W. Phelps, Sr., from the practice of law in federal district court for two years; the Tenth Circuit Court of Appeals had affirmed that decision and suspended Fred W. Phelps, Sr., from the practice of law before that Court for two years. In the Matter of the Disciplinary Proceeding of Fred W. Phelps, Sr., unpublished opinion and order of the Court, Theis, Saffels, and Stanley, JJ., Case No. 80-1152, 11-3-80 (D.C. Kan. 1980). [See Appendix C of this Brief in Opposition]; Disciplinary Proceeding of Phelps, 637 F.2d 171 (10th Cir. 1981)

rehearing denied, 4-8-81. (See Appendices D and E of this Brief in Opposition.)

The three-judge United States District Court took the record before the State Bar hearing panel and the Kansas Supreme Court, and virtually sat de novo in review of the state court proceedings, except they heard additional evidence from Fred W. Phelps, Sr. The court held in part:

> The Supreme Court, in holding as it did that the respondent violated DR 7-102(A)(1), violated the respondent's due process guarantees by denying him both notice of the charge and an opportunity to respond to that charge. The mere fact that the ethical infractions charged against respondent occurred in the course of the trial of Robinson v. Brady, whose record was necessarily before the Court to illuminate the misrepresentation issue, would in no way allow the enlargement of charges by the Kansas Supreme Court to include other misconduct shown in such record but not noticed and charged by the Disciplinarian and the Hearing Panel. The Kansas Supreme Court cannot justify any enlargement outside the scope of the Ruffalo holding. The Supreme

> Court's reliance on DR 7-102(A)(1) can serve no basis for action by this court, since as to that charge the first requirement of Selling, embodied in local Rule 4A II D1, is not met.
>
> While we have refused to follow our respected justices of the Kansas Supreme Court on the so-called vendetta issue, we agree with the high court's indignation at the tactics sought to be used by respondent to blacken the character of a defendant remote from facts and issues in a case . . . [Appendix C of this Brief in Opposition, pp. 14.]
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> . . .
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> There were, however, other ethical violations found by both the Supreme Court and the hearing panel which are not subject to the due process objection. It is these findings which must be more closely examined. [Appendix C of this Brief in Opposition, p. 16.]

After careful examination the three-judge district court found, just like the hearing panel and the Kansas Supreme Court, that Fred W. Phelps, Sr., by his actions, had violated DR 1-102(A)(4); DR 1-102(A)(5); DR 7-102(A)(5); and K.S.A. 60-211. The three-judge district court suspended Fred W. Phelps, Sr., from

the practice of law in its court for two years, effective December 3, 1980, saying in part:

> In view of the previous ethical transgressions of Mr. Phelps, as reflected in In Re Phelps, 204 Kan. 16, 459 P.2d 172 (1969), for a series of acts of attorney misconduct directed toward his clients, the members of this Court are unanimous in their belief that the public interest requires cessation of respondent's privilege to practice law in the federal courts. In this matter, and the most recent state court disciplinary proceedings, the charged misconduct has been against the integrity of our system of justice and the Court itself. [Appendix C of this Brief in Opposition, pp. 35, 36.]

The Tenth Circuit Court of Appeals in considering the appeal of Fred W. Phelps, Sr., from his federal suspension found he had violated the three disciplinary rules and one Kansas statute as the hearing panel, the Kansas Supreme Court, and the three-judge federal district court had previously found him to have violated. They found no constitutional infirmities as to these

holdings in any of the three previous proceedings. The Tenth Circuit Court went on to hold "that Phelps is guilty of ethical impropriety" and it suspended him from practice before the Tenth Circuit Court for two years, commencing February 27, 1981. Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981). (See Appendices D and E of this Brief in Opposition.)

Getting back to the present action, the Tenth Circuit Court of Appeals some six months after it affirmed In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., rendered its opinion in Phelps v. Kansas Supreme Court, the instant civil rights action. In that opinion the Tenth Circuit Court affirmed Judge Brimmer's Order and Judgment Dismissing Action, saying in part:

> Plaintiff claims that the action of the Kansas Supreme Court finding a violation of a disciplinary standard

not charged in the proceedings before the Review Panel deprived him of due process because he had no notice of, or opportunity to defend against, that specific charge. In taking its action the Kansas court had before it, and considered, only the evidence adduced in support of the violations charged in the complaint before the Review Panel. That evidence was confined to the misconduct of the plaintiff in the Robinson v. Brady litigation. The case at bar is distinguishable from In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117. That case involved two different, distinct, and unrelated incidents of misconduct and the respondent lawyer had notice only of one. We are concerned with one continued and integrated pattern of misconduct, plaintiff's actions in the Robinson v. Brady litigation. Plaintiff had full knowledge that his actions in that litigation were the basis for the disciplinary proceedings and full opportunity to present his defense. The Kansas court concluded that the misconduct in Robinson v. Brady violated another ethical standard in addition to the standards considered by the Review Panel. (662 F.2d 650, 651.)

. . . .

In the case at bar plaintiff attacks the general rules and their application to him. The district court held that the general rules were constitutional and we agree. The attack on those rules borders on the frivolous. (662 F.2d 651.)

. . . .

> The Kansas Supreme Court could have disbarred Phelps on any one of the charges heard and considered by the Review Panel and sustained by the court. The issue narrows to whether, by finding plaintiff in violation of an ethical standard not specified in the complaint against him, the disbarment must fail because of denial of due process. On the other charges, plaintiff does not assert a due process claim. Indeed, he cannot because he had notice and full opportunity to be heard. (662 F.2d 651.) (Emphasis supplied.)
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> . . . .
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> The Kansas court found one statutory and three ethical standard violations. Any one of these sufficed to sustain the disbarment sanction. These violations were free from any claim of unconstitutionality. Plaintiff says that the disbarment must be enjoined because on the same evidence the court found violation of another ethical standard, and in so doing deprived plaintiff of his due process rights. We disagree. (662 F.2d 651, 652.) (Emphasis supplied.)

It must be noted that if the absurd allegation of Fred W. Phelps, Sr., that if one violation found by the Kansas Supreme Court was allegedly tainted by lack of notice and opportunity to be heard, then all their actions must be unconstitu-

tional and thus void, was carried to its logical end, then the federal district court's suspension and the Tenth Circuit's suspension of Fred W. Phelps, Sr., would also be "tainted," because each is based initially upon the findings and opinion of the Kansas Supreme Court in State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979) cert. denied 444 U.S. 1045 (1980).

The Tenth Circuit properly noted that even if the Kansas Supreme Court's opinion contained error, that error did not have any affect on Fred W. Phelps, Sr., saying:

> Plaintiff claims no collateral effects arising out of the Kansas court's holding that he violated an ethical standard which was not charged, and the record shows none. The evidence supporting the additional violation is the same as that supporting the other ethical violations. (662 F.2d 652.)

The Tenth Circuit Court affirmed Judge Brimmer's order and judgment

dismissing Fred W. Phelps, Sr.'s, action and sustained his "disbarment on the ethical violations which are free from constitutional objections." (662 F.2d 652.)

On January 27, 1982, Fred W. Phelps, Sr., filed his Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. The jurisdiction of this Court to hear this matter is questioned by respondents, as discussed in Part I under REASONS FOR DENYING WRIT of this Brief in Opposition.

REASONS FOR DENYING THE WRIT

I. THE UNITED STATES DISTRICT COURT FOR KANSAS DID NOT HAVE SUBJECT MATTER JURISDSICTION IN THE FIRST INSTANCE IN THIS CASE.

The district court in this action properly found that "[A] close reading of the complaint indicates that the true purpose of the plaintiff in filing this suit is to have this court review the proceedings of the Kansas Supreme Court in its actions against the plaintiff." (See Appendix A, p. 10, Petitioner's Petition.)

This Court and many federal courts have held on numerous occasions that lower federal courts do not have subject matter jurisdiction to review state disbarment proceedings had before state courts, even though the state court proceedings are alleged to have been constitutionally deficient. Selling v. Radford, 243 U.S. 46 (1917); Theard v. U.S.,

354 U.S. 278 (1957); Schware v. Board of Bar Examinations of New Mexico, 353 U.S. 232 (1957); Konigsberg v. State Bar of California, 353 U.S. 252 (1957); Gately v. Sutton, 310 F.2d 107 (10th Cir. 1962); Mayes v. Honn, 542 F.2d 822 (10th Cir. 1976); Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976); MacKay v. Nesbett, 412 F.2d 846 (9th Cir. 1969) cert. denied 396 U.S. 960 (1969); Ginger v. Circuit Court for County of Wayne, 372 F.2d 621 (6th Cir. 1967), cert. denied, 387 U.S. 935 (1967); Feldman v. State Board of Law Examiners, 438 F.2d 699 (8th Cir. 1971); Jones v. Hulse, 391 F.2d 198 (8th Cir. 1968), cert. denied, 393 U.S. 889 (1968); In Re MacNeil, 266 F.2d 167 (1st Cir. 1959); Clark v. State of Washington, 366 F.2d 678 (9th Cir. 1966); Lenske v. Sercombe, 266 F.Supp. 609 (D.C. OR. 1967), aff'd., 401 F.2d 520 (9th Cir. 1968); Turner v. American Bar Association, 407 F.Supp. 451

(W.D. Wis., 1975); Diehl v. United States, 438 F.2d 705 (5th Cir. 1971), cert. denied, 404 U.S. 830 (1971); Polk v. State Bar of Texas, 480 F.2d 998 (5th Cir. 1973); Saier v. State Bar of Michigan, 293 F.2d 756 (6th Cir. 1961); Mildner v. Gulotta, 405 F.Supp. 182 (E.D.N.Y. 1975); Tang v. Appellate Division, 487 F.2d 138 (2d Cir. 1973), cert. denied, 416 U.S. 906 (1974); Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6th Cir. 1970); Getty v. Reed and Collis v. Reed, cons'd, 547 F.2d 971 (6th Cir. 1977); Niles v. Lowe, 407 F.Supp. 132 (D.C. HA 1976).

This fundamental law is not changed by labeling the cause as a "civil rights" action. In the Tenth Circuit, a civil rights action can be maintained when the allegations claim due process or equal protection deprivations in the adoption and/or administration of general rules

and regulations governing the admission and disciplining of attorneys. Doe v. Pringle, 550 F.2d 596 (10th Cir. 1976). The district court in this action specifically found "the Kansas disciplinary rules and the way in which they are applied shows that they provide more than adequate due process and equal protection," while the Tenth Circuit Court of Appeals specifically held, "[i]n the case at bar plaintiff attacks the general rules and their application to him. The district court held that the general rules were constitutional and we agree. The attack on those rules borders on the frivolous." (See Appendix A, p. 16, and Appendix B, pp. 8, 9, Petitioner's Petition.) Most of Petitioner's case fails to establish the jurisdiction of the Court, the rest of it is frivolous.

II. REVIEW SHOULD NOT BE GRANTED IN A CASE WHERE THE PETITIONER INTENTIONALLY FAILED TO EXHAUST AN ADEQUATE AND AVAILABLE STATE LEGAL REMEDY.

Petitioner was disbarred on July 20, 1979. He could have filed a motion for rehearing or modification of the Kansas Supreme Court's order. Petitioner, for whatever reason, chose not to do this reasonable act. (Supreme Court Rule 7.06, 224 Kan. xlvii.) Petitioner could have, and still may, file a verified petition with the Kansas Supreme Court for reinstatement. The petition must set forth facts showing that petitioner has either rehabilitated himself or that petitioner is entitled to have his disbarment vacated, terminated, or modified for whatever reasons he brings to the attention of the Kansas Supreme Court. [Supreme Court Rule 219, 224 Kan. lxxxix.]

Petitioner never attempted to exhaust this available adequate state remedy. Under these circumstances, this Court should deny review. (See cases cited in Reason No. I above.)

III. THIS COURT SHOULD NOT REVIEW THIS ACTION BECAUSE PETITIONER HAS PREVIOUSLY RAISED IDENTICAL SUBSTANTIVE ISSUES BEFORE THIS COURT IN PHELPS V. STATE OF KANSAS, CASE NO. 79-732, CERT. DENIED, 444 U.S. 1045 (1980).

Petitioner applied to this Court for a petition for certiorari to the Supreme Court of Kansas on November 7, 1979, in United States Supreme Court Case No. 79-732. The substantive issues raised in that petition for certiorari were identical to the substantive issues raised in petitioner's present petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

C. Questions Presented

Petitioner believes the questions presented for review can be fairly stated as follows:

1. Whether Petitioner was denied procedural due process during the course of disciplinary proceedings before the Supreme Court of Kansas.

2. Whether Petitioner was denied substantive due process during the course of disciplinary proceedings before the Supreme Court of Kansas.

3. Whether the Rules of the Kansas Supreme Court Relating to Discipline and Disbarment of Attorneys, as applied to Petitioner, are constitutional.

4. Was Petitioner denied vital constitutional rights, including First Amendment and Fourteenth Amendment rights? (Petition for Writ of Certiorari to the Supreme Court of Kansas, Case No. 79-732, pp. 3, 4.)

Although more succinctly stated in that case than the present one, the substantive issues raised are the same.

Petitioner in his present petition raises many preposterous emotional points. Petitioner would have this Court grant a writ for certiorari based upon: a

dissenting judge; Monroe Friedman's ethical standards which "would be tantamount to providing unscrupulous attorney a license to abuse the legal process"; wild allegations that the Kansas Supreme Court may have "fallen into error due to extrajudicial pressures"; bold assertions that petitioner is the only noted civil rights lawyer in Kansas; the representation that the Tenth Circuit's majority opinion in Phelps v. Kansas Supreme Court should be reversed because petitioner disagrees with their decision. None of these are valid reasons to grant the writ.

IV. THERE ARE NO DECISIONAL CONFLICTS BETWEEN THIS COURT, THE CIRCUIT COURTS OF APPEALS, OR STATE COURT DECISIONS.

The Tenth Circuit Court of Appeals' opinion in this case follows established law. Petitioner's only claim of a conflict is with In Re Ruffalo, 390 U.S. 544,

88 S.Ct. 1222, 20 L.Ed.2d 117 (1968).

In Re Ruffalo has no application, factually or legally, to the present action. In Re Ruffalo was not a civil rights action; it did not seek review of a state disbarment order; it could not affect the Ohio Supreme Court's order of indefinite suspension. "That order became final and is not here on review." In Re Ruffalo, 390 U.S. 544, 545 (1968). This Court had previously denied certiorari in attorney Ruffalo's state action. Mahoning County Bar Assn. v. Ruffalo, 176 Ohio St. 263, 199 N.E.2d 396 (1964) cert. denied 379 U.S. 931 (1965).

In Re Ruffalo does not stand for the proposition that federal courts may, by way of a civil rights action, review the disbarment proceedings of a state's highest court.

Factually, there is even more reason

why In Re Ruffalo has no application to the present petition.

In all of the Ohio ethical proceedings, attorney Ruffalo was faced with numerous factual charges, see, for example, charges No. 3, 8, 9, 10, 11, and 12, In Re Ruffalo, 370 F.2d 447, 454-460 (6th Cir. 1966). Each of the factual allegations were distinct, different, and unrelated to each other. A new factual allegation was added by the hearing panel after Ruffalo and the other party involved, an investigator, had already testified. The Ohio Supreme Court found two ethical violations.

The Sixth Circuit on these facts found only one ethical violation. This Court reversed, because that one ethical violation was subject to due process violations (notice and opportunity to respond). See both In Re Ruffalo cases, supra.

Petitioner, before the Kansas hearing panel, was charged with one continuing and integrated pattern of misconduct. The question before the Kansas Supreme Court was whether petitioner's conduct in the Robinson v. Brady case violated the ethical standards of his profession. In the present action, as opposed to the Ruffalo cases, Petitioner has been found guilty of violating the same three ethical standards and one state statute by three separate courts in separate actions.

No new or separate charge was ever stated against the petitioner. There was nothing upon which the petitioner had no notice or opportunity to respond. The Kansas Supreme Court merely found when considering an exhibit put into evidence by petitioner, a violation of petitioner's duty not to harass or maliciously injure another person in petitioner's representation of a client.

This additional finding was made on evidence introduced by petitioner showing petitioner's ruthless four-day cross-examination of one witness. The evidence before the Kansas Supreme Court clearly showed petitioner to be guilty of violating the three canons and one statute, as all courts have found. In addition, that same evidence showed petitioner to be guilty of violating a canon not charged by the hearing panel.

Surely, a state supreme court has the inherent right and duty to judge the record properly before it, including the petitioner's exhibits, to determine if ethical violations actually occurred.

V. PETITIONER HAS NOT PRESENTED AN ISSUE OF NATIONAL IMPORTANCE, NOR HAS HE PRESENTED AN IMPORTANT FEDERAL QUESTION.

Petitioners seeking a writ of certiorari from this Court have an obligation to demonstrate that there are

special and important reasons for granting the writ of certiorari. It is not a remedy for achieving "individual justice in individual cases." Wright, Miller, Cooper and Grossman, Federal Practice and Procedure, Jurisdiction §4004.

It is petitioner's burden to show he is presenting an important question of federal law or an issue of national importance. He has totally failed to do either in his petition.

The only real issue raised in this case is whether a state supreme court may, under adequate substantive and procedural law, issue a ruling with finality in its own jurisdiction as to who is qualified to practice law within that state. Respondents respectfully submit that a state supreme court is in a much better position than this Court to judge the ethics of a practitioner in its jurisdiction and to

determine who is worthy to be licensed to practice before it and other state courts.

The Kansas Supreme Court in its rules has stated that the ". . . license to practice law in this state is a continuing proclamation by the Supreme Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and as an officer of the court." (Rule 202, 224 Kan. lxxxi.) The Kansas Supreme Court has found petitioner to be unfit to practice in Kansas courts, a finding which should not be disturbed by this Court.

VI. THE DISBARMENT OF FRED W. PHELPS, SR., BY THE KANSAS SUPREME COURT IS SUPPORTED BY THE KANSAS BAR ASSOCIATION FOR THE BENEFIT OF THE PEOPLE OF KANSAS.

The Kansas Bar Association filed an Brief Amicus Curiae in Phelps v. Kansas

Supreme Court, 662 F.2d 649 (10th Cir. 1981), supporting the District Court's opinion. In their conclusion, they stated:

> The Kansas Bar Association has filed this Brief Amicus Curiae for the purpose of protecting the paramount significance of the ethical standards and professional responsibility to which attorneys are and should be held and to ensure the maintenance of the right and autonomy of the state court system to control the conduct and practice of lawyers appearing in the courts of the State of Kansas. The disciplinary rules and procedures are integral to preserving the public confidence and trust in the justice system, particularly where significant criticism is leveled at the profession for failure to adequately police its own conduct. . . .
>
> Of course, the rights and interests of individual attorneys, as the plaintiff-appellant here, must be highly regarded and protected. But no less regard and protection must be given to the public, the courts, and the justice system. Those interests must be considered together.
>
> The Supreme Court of the State of Kansas has promulgated rules for the conduct and discipline of attorneys

who practice in the state courts of Kansas. Those rules and procedures are totally compatible with all concepts of fundamental fairness and procedural due process. Furthermore, they serve substantial state interests in preserving public trust, fair administration of justice, and due respect and dignity of and for the judicial system. There has not been, and indeed cannot be, any showing that the rules or procedures are unconstitutional.

More significantly, this action is an attempt by plaintiff-appellant to collat-erally attack the state court disciplinary proceeding. It has been a long standing and universally recognized rule of law that the federal and state courts are separate and distinct and each has autonomy over the practice of law before it. See Theard v. United States, supra. Moreover, it has been equally recognized that the federal courts will not sit in review or judgment over state court disciplinary proceedings except within the narrow limits of review on a writ of certiorari. Theard, supra. That rule of law has evolved through strong and carefully balanced policies.

The rule and policies should not be eroded away through new theories of collateral attack. The remedies available under 42 U.S.C. §1983 are valuable in our democratic society. However, they should not be used to obtain collateral attack of state

> court disciplinary proceedings and, thus, erode away policies and legal principles equally well established and valuable to our democratic society. Indeed, for the many reasons discussed in this Brief, Section 1983 remedies are particularly inappropriate in consideration of disciplinary proceedings.
>
> This action is a collateral attack. The District Court made that express finding. As such, the federal courts do not and should not take jurisdiction. Plaintiff-appellant's remedy was the writ of certiorari to the United States Supreme Court.

Petitioner previously violated the code of ethics of his profession. A state hearing panel, a state supreme court, a three judge district court, and a court of appeals have all found Petitioner to have again violated the ethics of his profession and a statute of Kansas. Petitioner's response has been to file a civil rights action showing complete insensitivity to his own conduct. He offers no acknowledgment of any wrongdoing on his

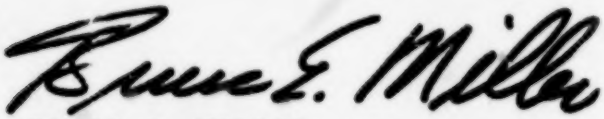
part, even though so found by three separate courts. The people of Kansas do not need such an attorney. They do need protection from such conduct.

CONCLUSION

The Tenth Circuit reached the correct result in accordance with the decisions of this Court and other federal courts. Certiorari should be denied.

Respectfully submitted,

ROBERT T. STEPHAN
Attorney General of Kansas



BRUCE E. MILLER
Deputy Attorney General of Kansas

PROOF OF SERVICE

The undersigned, BRUCE E. MILLER, a member of the Bar of this Court and counsel of record for Respondents herein, hereby certifies that on the 5th day of April, 1981, he caused to be served the foregoing Brief in Opposition to the Petition for Writ of Certiorari, together with Respondents' Appendices A Through E, on Petitioner in this appeal, by mailing five (5) copies thereof by ordinary mail, postage prepaid, addressed to his attorney, as follows:

FRED W. PHELPS, JR.
PHELPS - CHARTERED
1414 South Topeka Blvd.
Post Office Box 1886
Topeka, Kansas, 66601.

Bruce E. Miller

Bruce E. Miller

Appendix

1

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

No. 81-1411

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

FRED W. PHELPS, SR., Petitioner

v.

THE KANSAS SUPREME COURT; THE HONORABLE ALFRED G. SCHROEDER; THE HONORABLE ALEX M. FROMME; THE HONORABLE DAVID PRAGER; THE HONORABLE ROBERT H. MILLER; THE HONORABLE RICHARD M. HOLMES; THE HONORABLE KAY McFARLAND; THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity As Disciplinary Administrator of the Kansas Supreme Court; and THE STATE OF KANSAS, Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDICES A THROUGH E TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONDENTS' APPENDICES

APPENDIX A:

Copy of Unpublished Panel Report of the State Board of Law Examiners, In the Matter of the Complaint Against Fred W. Phelps, Sr., No. W-995, as issued on January 20, 1979, and filed with the Clerk of the Kansas Supreme Court on February 12, 1979.

APPENDIX B:

Copy of State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied 444 U.S. 1045, 62 L.Ed.2d 731, 100 S.Ct. 732 (1980).

APPENDIX C:

Copy of Unpublished Opinion and Order of the Court, In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., Theis, Saffels, & Stanley, JJ., Case No. 80-1152, 11-3-80 (D.C. Kan. 1980).

APPENDIX D:

Copy of Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981).

APPENDIX E:

Copy of Unpublished Judgment In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., Seth, C.J., Barrett, Doyle, JJ, Case No. 81-1022, consolidated with Misc. Case No. 80-8008, 2-27-81 (10th Cir. 1981).

APPENDIX A

APPENDIX A

BEFORE THE STATE BOARD OF LAW EXAMINERS

In the Matter of the Complaint Against
FRED W. PHELPS, SR.
No. W-995

PANEL REPORT

This matter was heard by a panel appointed by the Chairman, State Board of Law Examiners, acting pursuant to the Rules of the Supreme Court. The hearing was held on March 13, 14 and 15, 1978 in Topeka, Kansas. The panel was composed of Lee Hornbaker, designated as Chairman, and Paul L. Wilbert, both members of the State Board of Law Examiners and Stephen Kessler, Lawyer, Topeka, Kansas. The State appeared by and through Phillip A. Hartley, Assistant Attorney General. The Respondent appeared in person and with his attorney, A. J. Focht of Smith, Shay, Farmer & Wetta, Wichita; Fred Phelps, Jr. and Betty Phelps and F. G. Manzanares,

all of Topeka. No objections were voiced or filed to the composition of the panel or to prior proceedings and the matter proceeded to hearing on March 13, 1978. Trial briefs were filed by the parties and the matter was submitted on June 1, 1978.

BACKGROUND, COMPLAINT AND PRE-TRIAL ORDERS

The formal complaint which is the basis of his hearing was filed on 8 December 1977. Basically, the charges arise out of the actions of the Respondent in the trial of a case in the District Court of Shawnee County, Kansas, entitled Robinson v. Brady, Case #125,742. The complaint alleges that the Respondent misrepresented testimony in proffers of testimony to the trial court and in his Motion for a New Trial filed in the case. Attached to the complaint were various affidavits relating to the profferred testimony and the representations made by Respondent in the Motion for New Trial.

These affidavits are not considered as testimony by the Panel.

The Respondent filed an answer and denied he made any proffers of testimony which were not true and correct "to the best of his knowledge, belief and understanding" and denies any violation of the Code of Professional Responsibility, and denies the Complaint charges violation. In response to a motion filed by the Respondent, a pretrial hearing was held in Topeka, Kansas on February 9, 1978 by Lee Hornbaker and Stephen Kessler. The rulings made on that day were journalized and govern the procedures at the panel hearing. The ruling of that day as to the issues are:

> "3. The panel chairman then states it is his opinion and he rules that the issue in this case is as to whether the Respondent made false statements to the court in his proffered testimony and in his Motion for a New Trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in Paragraphs 1a, 1b

and 1c of the complaint. The panel chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the hearing panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proferred witnesses; more particularly the issues will be as to whether or not the Respondent violated

1. His oath as an attorney

2. DR1 - 102A4 - "Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation"

3. Did he violate DR1-102A5 - "Engage in Conduct that is Prejudicial to the Administration of Justice and

4. Did he violate DR7-102A5 - "Knowingly Make False Statements of Fact or Law" and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?"

At or prior to the panel hearing, the Respondent renewed his prior motion for Summary Judgment and attached affidavits of the Respondent and of various witnesses. The Motion for Summary Judgment was considered by the Panel on

March 13, 1978, and was by the Panel overruled and the matter proceeded to hearing. And the State made its opening statement and the Respondent made his opening statement and evidence was introduced.

STATEMENT OF THE CASE

This complaint arises out of alleged misconduct by the Respondent in a case entitled Robinson v. Brady, Case #125,742, District Court of Shawnee County, Kansas. That case was tried before The Honorable Terry Bullock in December, 1976. The allegation is that the Respondent made statements to the court, both orally and in writing relating to testimony that witnesses would give, if allowed to testify, when he knew or should have known the witnesses would not testify as he stated. The particular witnesses are:

Dan Turner
Richard Brewster
Patrick Connolly
Kathleen Fitzgerald

Rodney Joyce
Patrick Brady
Richard Waters
Jess Danner
B. L. Pringle.

The issue is not the truth or falsity of the proffered testimony but is whether or not the Respondent had a reasonable basis for making the proffers of testimony of these witnesses and making the statements set forth in the Motion for a New Trial with respect to the testimony of the proffered witnesses. (See Journal Entry of 2/9/78 and ruling by Chairman 3/2/78).

The specific statements and writings which constitute the basis of the complaint are set forth in the Complaint and the specific allegations of proffered testimony are found in the Motion for a New Trial (States Exhibit #2) filed in the Robinson case by the Respondent on January 4, 1977, and particularly Paragraph 1(a)(b)(c) thereof. We set these forth verbatim; copying from the

Motion for a New Trial filed by the Respondent.

"1. Erroneous rulings by the Court as follows:

(a) Rejecting the proffered testimony of R.W. Niederhauser, F.G. Manzanares, Jeff Danner and Richard Waters as follows: That Mssrs. Niederhauser and Manzanares qualified as practicing attorneys to have an opinoin as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. With regard to the testimony of Jess Danner and Richard Waters, that they qualified as certified court reporters to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. Rejecting Niederhauser July 15 and Aug. 1 telephone conversations with one identifying herself as speaking for defendant.

(b) In rejecting the proffered testimony of Ralph J. Hiett, B.L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, as follows: That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that

such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation; and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed as the court reporter for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under the law, the defendant Brady repeatedly "leaked" knowledge of such proceedings to certain of those being investigated by such grand jury and who were later indicted by such grand jury including but not limited to: Morris "Pete" Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called "architectural kickback case", and further included but not limited to the conduct of defendant in "leaking" two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of Kathy Fitzgerald and Karen Kennedy,

which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duth. Rejecting Appendix "C" in connection with such proffer.

(c) In rejecting the profered testimony of Patrick Brady, former husband of the defendant Brady, to the effect that the three children of the defendant, Mike, Karen and Laurie, were in fact living with him (Patrick Brady) and away from the defendant Brady during the years 1974 and 1975, the very years when the defendant Brady swore on her oath to the United States government and the State of Kansas on income tax returns admitted as evidence in this case that each of said three children were in fact living with the defendant Brady in 1974 and 1975 and that the defendant Brady was therefore entitled to claim each of said three children as her personal exemptions for said years, and further, that custody of the son of the parties, Mike, changed from the defendant Brady to Patrick Brady in 1973, and since that time, the son Mike has been living with Patrick rather than the defendant, and that the only remaining minor child of the parties, Laurie, is now in the custody of Patrick Brady and all in contradiction to the sworn testimony of the defendant Brady and constituting substantial impeachment of the defendant Brady and having strong probative value in the instant case going to the critical question of whether Mrs. Brady or Mr. Niederhauser was telling the

truth on vital questions of evidence."

The issue before the Panel is whether the Respondent had a reasonable basis for making the above allegations in his Motion for a New Trial. The panel finds it very difficult to follow the true import of the various statements of court and counsel in the course of the trial. It appears to the panel that the Respondent intended to and did make the unequivocal statement in court that the named witnesses would testify in the manner so stated if called as witnesses. But, we prefer to base our findings upon the written motion for a new trial and the statements and allegations made therein by the Respondent.

We note the "Motion for a New Trial" is signed by the Respondent. When the Respondent so signed the pleading, he thereby certified that he has read the pleading and that the best of his

knowledge, information and belief there is good grounds to support it. (see KSA 60-211) The same statute states that for a wilful violation of the section (KSA 60-211) an attorney may be subjected to appropriate disciplinary action.

The Respondent bases his defense upon his statement that he relied upon information given to him by a private investigator employed by the Respondent in the Brady case and in prior cases involving some of the same witnesses and parties and that he had a reasonable basis for making the statements. In fact, in an affidavit filed in the present case, the Respondent states:

> "That with regard to the proffers which were made by this Affiant during the course of said trial and with regard to the statements and pleadings relative to said proffers, all of which being the subject of this proceeding against him herein, this affiant relied upon the information supplied to him by Ralph J. Hiett."

The Respondent bases his defense

upon the ground that he had the right to rely upon his paid confidant, informer and investigator and contends that a lawyer has such a right. We need not explore the legal question as to the limits, if any, upon the right of the attorney to rely upon the information passed to him by his own employees. In this case, the Panel finds that prior to the time the proffers were made and prior to the time the Motion for a New Trial was made, the Respondent or his associate attorneys had in many, if not all instances, been advised that the witnesses would not testify in the manner as stated by the Respondent. We refer below to some of the witnesses and their testimony:

1. Jess Danner - Respondent stated he would testify the conduct of Brady was reckless. The transcript shows on Page 204

"Q. Prior to the taking of the

stand, did you discuss your testimony with Fred Phelps or any member of his staff or office:

A. I believe so."

And on Page 206

"Q. At any time, did you tell Mr. Phelps, prior to, say, February 1, 1977, or any representative of his office, that you would testify in the manner indicated on page 1114, starting at line 22, going to page 1115 (Transcript of Robinson v. Brady - See State Exhibit 8) ending at the conclusion of line 2?

A. No."

And on Page 208

"Q. Mr. Danner, recall as best you can what you told Mr. Phelps during your conversation shortly before the commencement of the trial of Robinson versus Brady.

A. Again, I don't remember exactly, but I know it didn't have anything to do with reckless. I may have testified or indicated to him that the way she handled matters was not the way I handled matters. But I in no way indicated she was reckless, or I in no way meant to indicate any meaning similar."

The Panel finds as a matter of fact from the testimony that the Respondent was told and knew prior to the time that he made the oral proffer and prior to the time he made the written Motion for a New Trial that Jess Danner would not testify the conduct of Brady was reckless. The personal knowledge of the Respondent overrides anything he may have been told by his investigator and informant.

2. Richard Waters - Here too the Respondent stated that Waters would testify the conduct of Brady was reckless. Waters testified that he personally discussed his testimony in the Brady case with the Respondent two or three days before the Brady trial (Tr. 1471) Waters said the discussion related to procedures used by reporters. Mr. Waters answers are not definite and the Panel finds as a matter of fact that the Respondent was justified in that he believed Waters would testify as to the

proffer and motion state (Tr 153)

3. B.L. Pringle - Mr. Pringle is a lawyer and was subponeaed as a witness in Robinson v. Brady. He testified that the Respondent called him two or three times before that trial and discussed his testimony (Tr 133). Mr. Pringle told the Respondent that he had no opinion as to the reputation of Brady for truth and veracity, (Tr-134) and that he had no opinion regarding the conduct of Brady with respect to certain grand jury proceedings (Tr 134). He testified he knew Ralph Hiett and had talked to him and it was obvious Hiett did not like Brady but he (Pringle) gave no opinion to Hiett.

The Panel finds that from the evidence that the Respondent had personally been informed by the witness Pringle that he (Pringle) had no opinion as to the reputation of Carolene Brady for truth and veracity and he had no knowledge or information relative to the manner she

handled her assignment before a designated grand jury. The question of whether Respondent had the right to rely on his informant again is immaterial for the personal knowledge of the Respondent direct from the witness overrides the innuendoes and suppositions apparently conveyed by the informant.

4. Patrick Connolly - The Respondent in his Motion for a New Trial refers to knowledge possessed by and testimony to be offered by Patrick Connolly. Mr. Connolly is an attorney and was an assistant attorney-general and is a deputy district attorney in Sedgwick County. He was subpoenaed as a witness in the trial of Robinson v. Brady (Tr-82). In November, 1976, before he was subpoenaed, he visited with the Respondent by telephone. Connolly denied that he ever told the Respondent that he would testify that in his opinion Brady was not a truthful person. The Panel finds that there was no reasonable basis

for the Respondent to believe or state that Connolly would testify in the manner set forth in the Motion for a New Trial.

5. Dan Turner - Mr. Turner is an attorney and the Respondent in his Motion for a New Trial makes statements as to knowledge of and testimony that would be offered by Turner. Turner testified that he was subpoenaed by Respondent in the Robinson trial and after receiving the subpoenea, he called the Respondent (Tr-106) and discussed why he (Turner) was subpoenaed. Turner further said he did not talk to Ralph Hiett. Turner stated he never told the Respondent or Hiett that he had an opinion as to the reputation of Brady in the community or her attitude towards her oath and obligation (Tr 111). The Panel finds that the Respondent had no reasonable or resonsible basis for the allegations in his Motion for a New Trial attributable to Turner.

6. Richard Brewster - Also an attorney, was also subpoenaed as a witness. He testified no one talked to him before he received the subpoena (Tr 230). After receiving the subpoena, he called the Respondent and he (Brewster) told Phelps personally that he would not testify as Respondent had set forth in the Motion for a New Trial (Tr 233).

> "Q. Mr. Brewster, did you indicate to Mr. Phelps or any representative of his office or to Ralph Hiett that you would testify in whole or in part to any of the facts indicated in Paragraph B?
>
> A. No, I did not."

The Panel finds as a matter of fact that the Respondent had no reasonable basis for his allegations in the Motion for a New Trial regarding the proffered testimony of Richard Brewster.

7. Rodney Joyce - Who was named as a witness by the Respondent in his Motion for a New Trial, testified at the hearing that prior to January 7, 1977, the

Respondent had not visited with him regarding Brady and further that no one from Respondent's office had visited with him regarding the matter (Tr-251). Mr. Joyce was the newsman who uncovered certain stories that were aired but he denied knowing Brady. The Panel finds that the respondent had no reasonable basis for his allegations as to the proffered testimony of Joyce.

8. Patrick Brady - The Respondent at two separate places in his Motion for a New Trial refers to Patrick Brady and his testimony if allowed to testify. Brady was subpoenaed as a witness at the trial of Robinson v. Brady. Prior to receiving the subpoena he had not discussed his testimony with the Respondent or any person associated with the Phelps office. In the courtroom during the trial of Robinson v. Brady, Brady talked to the Respondent and told the Respondent that the things he (Phelps) wanted him to

testify were not true (Tr 171). The Panel finds as a matter of fact that the Respondent had no reasonable basis for the statement made in the Motion for a New Trial as to the rejected testimony.

9. Kathleen Fitzgerald - Testified she knows the Respondent but she was not called as a witness in the case of Robinson v. Brady. She did discuss the case and her possible testimony with attorney Tom Theis. (He represented Carolene Brady) She knows Brady professionally. She talked to no one about her possible testimony in the Brady case until January 13, 1977, which was 9 days after Respondent filed his Motion for a New Trial (Tr-49). She testified she has no knowledge or opinion as to the reputation of Brady for truth and veracity (Tr-51) (57). The Panel finds from the testimony that the Respondent had no reasonable basis for the allegations of testimony by this witness.

The Panel notes that the Respondent himself testified as to the basis of the allegations and the background of the case of Robinson v. Brady and of the other cases which seem to be intertwined herein. We have noted and considered his explanation of the oral proffers in the Robinson case and of the written statements in the Motion for a New Trial. We have reviewed the testimony of the witnesses called by the Respondent including that of Ralph L. Hiett and of other witnesses whose testimony tends to cooroberate the proffers. The Panel has considered this testimony and finds that it does not overcome the direct testimony of the proffered witnesses as reviewed above.

The Panel does not say that the Respondent, or any attorney, cannot rely upon information given to the attorney by investigators or informants. But, the attorney does have a duty to weigh that

information and to consider its source and the possible bias or prejudice of the informant. And where, as in the subject case, the attorney has personal knowledge from the witness or witnesses that he will not testify in the manner as indicated by the investigator or informant, then the attorney cannot ignore that direct information and rely solely upon the information from the investigator or informant.

The Respondent seeks to vindicate his written Motion for a New Trial by an interpretation of the motion to the effect that not all persons named would testify to all the proffers. (Tr-527) but that some would testify to each element. The Panel concludes this is a strained construction and interpretation of the writing. Had the Respondent so intended when he wrote the motion, he could easily have used language that would have expressly set forth what each witness

would offer in testimony. The Respondent elected to "lump" the names and proffers and the posthumous explantaion is not accepted by the Panel.

The Panel recognizes that in the trial of a case things may be said inadvertantly. Also, we note that the reading of the transcript of the trial of Robinson v. Brady makes it difficult to get the full or true meaning of statements by counsel and of ruling by the court. However, the wirtten Motion for a New Trial is of a different character. Here the Respondent was in the quiet of his office; he has spoken with the witnesses and has been advised by them as to what they will and will not testify; he has opportunity to confer with his co-counsel and with his investigator and informant. At that time he could have and should have taken steps to make certain that his "proffers" were in fact correct. This would not have been difficult. For

example, the Respondent had himself talked to several of the named witnesses and had been personally advised by certain of the witnesses that they could not and would not testify in the manner or to the things set forth in the motion.

An inquiry to the investigator would have disclosed that (1) he made no written reports of his interviews and that some of the interviews were conducted in 1973 (Tr 418). (2) That Kathleen Fitzgerald had no direct information as to who may have "leaked" testimony of a secret nature (Tr 419-420) (3) That the informant and investigator had never personally talked to Patrick Brady or Joyce (Tr 423) but he did talk to Joyce by phone and Joyce declined to talk about the reputation of Brady (Tr-424). (4) That he last talked to Joyce in 1973 (Tr-425) and to Brewster in 1973 (Tr-425).

At the meeting of Respondent and his co-counsel on or about January 2, 1977,

when the Motion for a New Trial was prepared, the Respondent knew that certain of the witnesses would not testify as orally proffered, but he made no mention of that fact and in fact prepared and signed the motion with that knowledge in mind.

Tr-430 (testimony relating to the preparation of the Motion for a New Trial)

> "Q. At that time did Mr. Phelps advise you or say anything to you or Mr. Niederhauser or anything that you heard that he had information that Pringle, Connolly, Brewster, Turner and Brady would not so testify as was stated in here?
>
> A. (By Hiett) No."

A lawyer is an officer of the court and owes a duty to the court and to his client. DR 1-102 states:

> "A lawyer shall not
>
> (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The Panel finds that the Respondent knew that the witnesses named in the Motion for a New Trial would not each

testify as the motion states. This information was made known to the Resondent personally by some of the named witnesses. Further, because of the Respondent's personal involvement in other prior cases and investigations, the Respondent, as an attorney, had a duty to check his sources of information, the accuracy of the information, and the possible prejudice of the informant. The Respondent ignored the warning signals and his own personal knowledge and the Panel finds that his conduct in signing and filing the Motion for a New Trial constitutes a violation of DR 1-102(A)(4) and also a violation of DR 1-102(A)(5) in that he did engage in conduct that is prejudicial to the administration of justice.

A lawyer is an advocate and he has a duty to represent his client zealously. But, he must do so within the bounds of the law. DR 7-102 states:

"A - In his representation of a client, a lawyer shall not

(5) Knowingly make false statements of law or fact."

The Panel finds that the Respondent had personal knowledge prior to the time the oral proffers were made and prior to the time the written Motion was filed that some or all of the named witnesses would not testify in the manner and to the things as stated in the proffers and in the Motion for a New Trial. It is apparent to the Panel that the Respondent was relying on innuendos and deductions and the hope that the witnesses, if called to the stand, might change their testimony. But the Respondent does not so state in his proffers or in the motion. The Respondent chose to ignore the direct testimony he had personally received and to accept the statements of his investigator and informant. The Panel finds that the Respondent did knowingly make false

statements of fact and did violate DR 7-102(A)(5).

The Panel further finds that when the Respondent signed the Motion for a New Trial, he knew of his own knowledge that certain of the statements therein made were not true and that the witnesses would not so testify and that by signing the pleading he thereby violated KSA 60-211, and that the signing of the Motion by the Respondent was a wilful act.

Beyond these specific findings, the testimony in this case and the reference to prior related cases disclose a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his clent and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon. We do not make such a specific finding. However, we do call the attention of the Respondent to DR 7-102(a)(1):

> "In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows that such action would serve merely to harass or maliciously injure another."

We merely suggest to the Respondent that he might well take a critical look at his tactics and policy and procedures in his utilization of his license as a lawyer and answer truthfully to himself the question - "Am I fulfilling my duty as a lawyer?"

The Panel has received and has reviewed and studied the briefs prepared and filed by counsel for the State and counsel for the Respondent. They are most helpful. Unfortunately, there are not many decided cases upon the points we are now considering. Most of the cases deal with the application of Federal Rule 11, our KSA 60-211. The case of Miller v. Schweickart, 413F Supp (1059) (1061)

(USDC-SDNY-1976) is cited by both counsel and thoroughly dissected. It involved a complant in a class action and the Court said

> "Lawyers have a responsibility before subscribing their name to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made on information and belief---Unverified heresay based on rumor is not sufficient upon which to subject one to the burdens of complex litigation and heavy legal costs" (underlining added)

We recognize this case is not directly in point for it refers to a complaint and not a motion or subsidiary pleading. But, we are of the opinion the wording is peculiarly applicable to this case. The Respondent contends he did have a reasonable basis for his allegations, namely a co-counsel, his investigator and informant,, and a third party. But, the inferences and innuendos and conclusions of those parties had been directly controverted by certain of the witnesses named by the Respondent in his Motion for

a New Trial. The Respondent chose to ignore the direct negation by the witness, of which he had personal knowledge, and based his affidavit upon the erroneous information given to him by those whom he chose to believe.

We point out that KSA 60-211, which refers to pleadings is made applicable to all "motions and other papers" by KSA 60-207(B). (See also Fed Rule 11 and 7 and U.S. ex rel Foster Wheeler Corp v. American Surety Co. 25 F Supp 225 (EDNY-1938) and Wright & Miller Fed Practice & Procedure, Vol 5, Par 1332.

And in the article "Honesty in Pleading and its Enforcement" by D. Michael Risinger, Minnesota Law Review - 1976, Vol 61, Page 1 of his conclusion, the author states with respect to Rule 11 (KSA 60-211)

> "Rule 11 seeks to obtain honesty in pleadings by requiring the signature of an attorney and by requiring that there be good ground to support the document signed. Good ground cannot

exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document. (underlining added)

We cannot accept the Respondent's argument of "reasonable basis" when certain of the named witnesses had personally advised the Respondent that they had no knowledge or information on the matters sought to be elicited or that they would not testify as stated by the Respondent in the affidavit.

We have also considered Respondent's procedural objections and contentions. In our opinion the issue is not whether the trial court was misled but rather is whether the Respondent knowingly made false statements to the Court in his Motion for a New Trial, and we have found from the evidence that the Respondent did knowingly make such false statements.

SPECIFIC RULINGS ON MOTIONS

The motion for summary judgment filed on behalf of the Respondent is overruled.

The motion asking for involuntary dismissal of the complaint and the motion by the Respondent for judgment in his favor is denied.

The State made a motion asking that certain parts of the testimony be sequestered and held confidential. That is the testimony of one of the witnesses called by the Respondent. The Panel finds that the release of testimony could serve no useful purpose and could do irrepairable injury and the Panel sustains the motion and the Disciplinary Administrator and the Clerk are to not release any of the subject testimony unless such release is hereafter authorized by the Supreme Court.

The Panel finds that the Respondent has violated

DR 1-102(A)(4)
DR 1-102(A)(5)
DR 7-102(A)(5)
and
KSA 60-211

The Respondent has previously been subject to discipline by the Supreme Court (see State v. Phelps, 204K 16 (1969). However, even with the prior discipline, the Panel concludes the violations found herein do not justify suspension or disbarment. The Panel does sincerely hope the Respondent will assess his own actions and reform his tactics. He is an able lawyer and can be an able lawyer within the bounds of the Code of Professional Responsibility. We therefore recommend Public Censure with the sincere hope the Respondent will hereafter conduct himself in such a manner that he will not again be before this Disciplinary Board.

(Signed) Lee Hornbaker, Chairman
(Signed) Paul L. Wilbert
(Signed) Stephen Kessler

January 20, 1979

APPENDIX B

No. 50,834

STATE OF KANSAS, Petitioner, v.
FRED W. PHELPS, SR.,
Respondent.

Disciplinary Proceeding
(598 P.2d 180)

Order of Disbarment

ATTORNEYS--Disciplinary Proceeding--Disbarment.

Philip A. Harley, disciplinary counsel, argued the cause and was on the brief for the petitioner.

A. J. "Jack" Focht, of Wichita, argued the cause, and Fred W. Phelps, Jr., of Topeka, and F.G. Manzanares, of Topeka, were with him on the brief for the respondent.

Per Curiam: On March 13, 14 and 15, 1978, a panel of the State Board of Law Examiners held a hearing on a complaint against respondent, Fred W. Phelps, Sr. It filed its report, findings and recommendations on February 12, 1979. The action is before this court pursuant

to Supreme Court Rule 212 (224 Kan. lxxxvi-lxxxvii; old rule No. 213, 223 Kan. lxxxiv).

The facts out of which respondent's violations arose are as follows: On May 31, 1974, a preliminary hearing was held in Division One of the Magistrate Court of Shawnee County, Kansas, before Judge Allan A. Hazlett, wherein the State of Kansas was plaintiff and Sherman Robinson was the defendant charged with a felony and represented by R.W. Niederhauser, attorney. Carolene Brady was the court reporter who took the testimony at the hearing.

On July 15, 1974, Mr. Niederhauser attempted to call Carolene Brady to notify her he needed a transcription of the testimony at the Robinson preliminary hearing, but was informed Brady was on vacation and would not return until August 1, 1974. In the meantime, R.W. Niederhauser had employed Fred W. Phelps, Sr. to try the Robinson case.

On July 31, 1974, Carolene Brady returned from her vacation and on August 5, 1974, she was contacted by Niederhauser about transcribing the testimony from the Robinson preliminary hearing. Mrs. Brady advised Mr. Niederhauser at that time that she was working on a transcript for Russell Shultz of Wichita and she would not be able to provide the Robinson transcript by the date Niederhauser desired it, which was August 9, 1974. Brady told Neiderhauser if he could obtain a continuance of the trial she would try to complete the transcript by August 13, 1974, and would call him on August 12, 1974 and report. The continuance to August 13 was obtained.

On August 12, 1974, Brady tried to contact Niederhauser to report she had the testimony dictated onto tape but she couldn't find a typist. Niederhauser was not available when she telephoned so she left word for him to return her call. The

call was never returned.

Later on August 12, 1974, Carolene Brady received a telephone call from a female who said she was calling from Phelps' office advising her she'd better have the Robinson transcript ready that day "or else." The person was later identified as Fred Phelps' daughter, Shirley.

Brady next called Fred Phelps, Sr. to notify him, since she couldn't find Neiderhauser, that she would be unable to get the testimony typed on time. Phelps responded angrily and told her he had wanted to sue her for a long time. Thereafter, Phelps, on behalf of Robinson, filed a mandamus action in Shawnee County District Court, case No. 125695, and obtained an emergency court order for Carolene Brady to produce the transcribed testmony by 9:00 P.M. [sic] August 13, 1974, or to appear August 13, 1974, at 1:30 P.M. and show cause to the

contrary. Brady found a Ms. Laird, who picked up the tapes around 4:00 P.M. August 12, 1974, and typed the transcript, taking some 6 hours to complete it. The transcription was delivered to the court at 8:30 A.M. August 13, 1974. Brady appeared at 1:30 P.M. to show cause but no action was taken. Sherman Robinson went to trial on August 14, 1974, and was acquitted.

In spite of the successful termination of the criminal action which set this sequence of events in motion, Robinson or his attorney, Phelps, continued to pursue the mandamus action and, in addition, filed a damage suit against Carolene Brady for fraud and misrepresentation, designated as case No. 125,742, in the District Court of Shawnee County, Kansas. The petitioner prayed for $2,000.00 actual damages and $20,000.00 punitive damages.

Case No. 125742, the damage suit, was set for trial December 16, 1976,

before a jury of six, lasting 8 days. It resulted in a verdict for Carolene Brady. Case No. 125695, the mandamus action, was tried at the same time but to the court. It also resulted in a verdict for Brady.

In both trials, Fred Phelps, Sr. represented Sherman Robinson and tried the case. Fred Phelps, Jr. assisted. The case appeared to be Phelps' personal case. He called the defendant, Carolene Brady, as his witness, had her declared hostile, then proceeded to cross-examine her for 3 or 4 full days. The record discloses that his cross-examination was abusive, repetitive, irrelevant, and represented a classic case of "badgering" a witness. Then he had the temerity to complain that Brady cried in the presence of the jury. Throughout the trial, Phelps made attempt after attempt to adduce testimony concerning Carolene Brady's reputation for truth and veracity, her reputation for competency,

the falsification of her income tax return and her morality, or lack thereof.

It is clear from our examination of the record and transcripts in that case that the trial was a personal vendetta by Fred Phelps, Sr. against Carolene Brady. The jury verdict didn't stop the onslaught on Phelps. He was not satisfied with the hurt, pain and damage he had visited on Carolene Brady. He filed a motion for a new trial, the controversial part of which is herewith set out in full:

> "1. Erroneous rulings by the Court as follows:
>
> (a) Rejecting the proffered testimony of R.W. Niederhauser, F.G. Manzanares, Jeff Danner and Richard Waters as follows: That Mssrs. Niederhauser and Manzanares qualified as practicing attorneys to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. With regard to the testimony of Jess Danner and Richard Waters, that they qualified as certified court reporters to have an opinion as to the conduct of defendant herein, assuming all

relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. Rejecting Niederhauser July 15 and Aug. 1 telephone conversations with one identifying herself as speaking for defendant.

(b) In rejecting the proffered testimony of Ralph J. Hiett, B.L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, as follows: That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation; and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed as the court reporter for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under

the law, the defendant Brady repeatedly "leaked" knowledge of such proceedings to certain of those being investigated by such grand jury and who were later indicted by such grand jury including but not limited to: Morris "Pete" Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called "architectural kickback case", and further included but not limited to the conduct of defendant in "leaking" two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of Kathy Fitzgerald and Karen Kennedy, which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duth. Rejecting Appendix "C" in connection with such proffer.

(c) In rejecting the profered testimony of Patrick Brady, former husband of the defendant Brady, to the effect that the three children of the defendant, Mike, Karen and Laurie, were in fact living with him (Patrick Brady) and away from the defendant Brady during the years 1974 and 1975, the very years when the defendant Brady swore on her oath to the United States government and the State of Kansas on income tax returns admitted as evidence in this case that each of said three children were in fact living with the defendant Brady in 1974 and 1975 and that the defendant Brady was therefore entitled to claim each of

said three children as her personal exemptions for said years, and further, that custody of the son of the parties, Mike, changed from the defendant Brady to Patrick Brady in 1973, and since that time, the son Mike has been living with Patrick rather than the defendant, and that the only remaining minor child of the parties, Laurie, is now in the custody of Patrick Brady and all in contradiction to the sworn testimony of the defendant Brady and constituting substantial impeachment of the defendant Brady and having strong probative value in the instant case going to the critical question of whether Mrs. Brady or Mr. Niederhauser was telling the truth on vital questions of evidence."

The defendant, Carolene Brady, responded to Phelps' motion for a new trial by obtaining and filing affidavits from eight of the witnesses, listed by Phelps, showing they would not testify as Phelps indicated they would. The motion for a new trial was denied and the case was appealed to the Court of Appeals where the judgment of the trial court was affirmed February 17, 1978.

After Phelps had appealed Robinson v. Brady to the Court of Appeals, he filed documents to the trial court entitled, "Plaintiff's Reply Affidavits to Defendant's Post-Trial and Post-Appeal Affidavits." The content of the affidavits was so scurrilous that the Court of Appeals ordered its copies expunged as of the date of the opinion and the trial court later expunged its copies from the record on November 22, 1978. In spite of the court's order of expungement, Phelps attached two of these affidavits to the reply brief filed with this court in the present case, thus successfully making them public documents. These affidavits cast reflections on Carolene Brady's character, wholly outside the issues of either the mandamus action or the fraud and misrepresentation case.

The facts of the case against Carolene Brady were brought to the

attention of Arno Windscheffel, the disciplinary administrator, and a formal complaint was filed against Fred W. Phelps, Sr., on November 8, 1977. The complaint alleges the respondent made his proffers of testimony during the Robinson v. Brady trial and filed a motion for new trial asserting certain individuals would testify in a certain way as to Carolene Brady's reputation for truth and veracity, for competency and reckless conduct, attitude toward her oath and obligation and for keeping a secret. Further, the complaint noted the affidavits filed by the eight witnesses stating they would not testify as asserted in the motion for new trial. Finally, the complaint alleged Phelps had "[N]o reasonable basis for asserting that the . . . named persons would testify in the manner in which he contends . . . some of the named individuals had told Phelps that they would not so testify."

Respondent answered denying the allegations of the complaint that he made proffers of testimony which were not true and correct to the best of his knowledge, belief and understanding.

A pretrial conference was held February 9, 1978, where the issues were defined as follows:

> "3. The panel chairman then states it is his opinion and he rules that the issue in this case is as to whether the Respondent made false statements to the court in his proffered testimony and in his Motion for a New Trial when the Respondent referred to his knowledge of and the nature of the testimony which would be presented by the witnesses named in Paragraphs 1a, 1b and 1c of the complaint. The panel chairman further rules that the issue of the ultimate truth of the proffered testimony is not before the hearing panel but the question is as to whether or not Fred Phelps knowingly made false statements of law or fact as to the testimony of the proferred witnesses; more particularly the issues will be as to whether or not the Respondent violated
>
> 1. His oath as an attorney
> 2. DR1 - 102A4 - "Engage in Conduct Involving Dishonesty, Fraud, Deceit or Misrepresentation"

3. Did he violate DR1-102A5 - "Engage in Conduct that is Prejudicial to the Administration of Justice and

4. Did he violate DR7-102A5 - "Knowingly Make False Statements of Fact or Law" and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?"

The disciplinary hearing before the panel was held March 13, 14 and 15, 1978, with trial briefs submitted June 1, 1978. The panel made the following findings:

> The Respondent seeks to vindicate his written Motion for a New Trial by an interpretation of the motion to the effect that not all persons named would testify to all the proffers. (Tr-527) but that some would testify to each element. The Panel concludes this is a strained construction and interpretation of the writing. Had the Respondent so intended when he wrote the motion, he could easily have used language that would have expressly set forth what each witness would offer in testimony. The Respondent elected to "lump" the names and proffers and the posthumous explantaion is not accepted by the Panel.
>
> The Panel recognizes that in the trial of a case things may be said inadvertantly. Also, we note that the reading of the transcript of the trial of Robinson v. Brady makes it

difficult to get the full or true meaning of statements by counsel and of ruling by the court. However, the wirtten Motion for a New Trial is of a different character. Here the Respondent was in the quiet of his office; he has spoken with the witnesses and has been advised by them as to what they will and will not testify; he has opportunity to confer with his co-counsel and with his investigator and informant. At that time he could have and should have taken steps to make certain that his "proffers" were in fact correct. This would not have been difficult. For example, the Respondent had himself talked to several of the named witnesses and had been personally advised by certain of the witnesses that they could not and would not testify in the manner or to the things set forth in the motion.

An inquiry to the investigator would have disclosed that (1) he made no written reports of his interviews and that some of the interviews were conducted in 1973 (Tr 418). (2) That Kathleen Fitzgerald had no direct information as to who may have "leaked" testimony of a secret nature (Tr 419-420) (3) That the informant and investigator had never personally talked to Patrick Brady or Joyce (Tr 423) but he did talk to Joyce by phone and Joyce declined to talk about the reputation of Brady (Tr-424). (4) That he last talked to Joyce in 1973 (Tr-425) and to Brewster in 1973 (Tr-425).

At the meeting of Respondent and his co-counsel on or about January 2, 1977, when the Motion for a New Trial

was prepared, the Respondent knew that certain of the witnesses would not testify as orally proffered, but he made no mention of that fact and in fact prepared and signed the motion with that knowledge in mind.

Tr-430 (testimony relating to the preparation of the Motion for a New Trial)

"Q. At that time did Mr. Phelps advise you or say anything to you or Mr. Niederhauser or anything that you heard that he had information that Pringle, Connolly, Brewster, Turner and Brady would not so testify as was stated in here?

A. (By Hiett) No."

A lawyer is an officer of the court and owes a duty to the court and to his client. DR 1-102 states:

"A lawyer shall not

(4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

The Panel finds that the Respondent knew that the witnesses named in the Motion for a New Trial would not each testify as the motion states. This information was made known to the Resondent personally by some of the named witnesses. Further, because of the Respondent's personal involvement in other prior cases and investigations, the Respondent, as an attorney, had a duty to check his sources of information, the accuracy of the information, and the possible prejudice of the informant. The Respondent ignored the warning

signals and his own personal knowledge and the Panel finds that his conduct in signing and filing the Motion for a New Trial constitutes a violation of DR 1-102(A)(4) and also a violation of DR 1-102(A)(5) in that he did engage in conduct that is prejudicial to the administration of justice.

A lawyer is an advocate and he has a duty to represent his client zealously. But, he must do so within the bounds of the law. DR 7-102 states:

"A - In his representation of a client, a lawyer shall not

(5) Knowingly make false statements of law or fact."

The Panel finds that the Respondent had personal knowledge prior to the time the oral proffers were made and prior to the time the written Motion was filed that some or all of the named witnesses would not testify in the manner and to the things as stated in the proffers and in the Motion for a New Trial. It is apparent to the Panel that the Respondent was relying on innuendos and deductions and the hope that the witnesses, if called to the stand, might change their testimony. But the Respondent does not so state in his proffers or in the motion. The Respondent chose to ignore the direct testimony he had personally received and to accept the statements of his investigator and informant. The Panel finds that the Respondent did knowingly make false statements of fact and did violate DR 7-102(A)(5).

The Panel further finds that when the Respondent signed the Motion for a New Trial, he knew of his own knowledge that certain of the statements therein made were not true and that the witnesses would not so testify and that by signing the pleading he thereby violated KSA 60-211, and that the signing of the Motion by the Respondent was a wilful act.

Beyond these specific findings, the testimony in this case and the reference to prior related cases disclose a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his clent and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon. We do not make such a specific finding. However, we do call the attention of the Respondent to DR 7-102(a)[sic] (1):

"In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows that such action would serve merely to harass or maliciously injure another."

We merely suggest to the Respondent that he might well take a critical look at his tactics and policy and procedures in his utilization of his license as a lawyer and answer truthfully to himself the question - "Am I fulfilling my duty as a lawyer?"

The Panel has received and has reviewed and studied the briefs prepared and filed by counsel for the State and counsel for the Respondent. They are most helpful. Unfortunately, there are not many decided cases upon the points we are now considering. Most of the cases deal with the application of Federal Rule 11, our KSA 60-211. The case of Miller v. Schweickart, 413F Supp (1059) (1061) (USDC-SDNY-1976) is cited by both counsel and thoroughly dissected. It involved a complant in a class action and the Court said

"Lawyers have a responsibility before subscribing their name to complaints which contain serious charges to ascertain that a reasonable basis exists for the allegations, even if they are made on information and belief---Unverified heresay based on rumor is not sufficient upon which to subject one to the burdens of complex litigation and heavy legal costs" (underlining added)

We recognize this case is not directly in point for it refers to a complaint and not a motion or subsidiary pleading. But, we are of the opinion the wording is peculiarly applicable to this case. The Respondent contends he did have a reasonable basis for his allegations, namely a co-counsel, his investigator and informant,, and a third party. But, the inferences and innuendos and conclusions of those parties had been directly controverted by certain of the witnesses named by the Respondent in his Motion for a New Trial. The Respondent chose to ignore the

direct negation by the witness, of which he had personal knowledge, and based his affidavit upon the erroneous information given to him by those whom he chose to believe.

We point out that KSA 60-211, which refers to pleadings is made applicable to all "motions and other papers" by KSA 60-207(B). (See also Fed Rule 11 and 7 and U.S. ex rel Foster Wheeler Corp v. American Surety Co. 25 F Supp 225 (EDNY-1938) and Wright & Miller Fed Practice & Procedure, Vol 5, Par 1332.

And in the article "Honesty in Pleading and its Enforcement" by D. Michael Risinger, Minnesota Law Review - 1976, Vol 61, Page 1 of his conclusion, the author states with respect to Rule 11 (KSA 60-211)

"Rule 11 seeks to obtain honesty in pleadings by requiring the signature of an attorney and by requiring that there be good ground to support the document signed. Good ground cannot exist as to any alleged proposition known to be false, including a denial; further, an attorney must engage in reasonable investigation to determine the probability of any proposition he proposes to allege in a pleading or other document. (underlining added)

We cannot accept the Respondent's argument of "reasonable basis" when certain of the named witnesses had personally advised the Respondent that they had no knowledge or information on the matters sought to be elicited or that they would not testify as stated by the Respondent in the affidavit.

> We have also considered Respondent's procedural objections and contentions. In our opinion the issue is not whether the trial court was misled but rather is whether the Respondent knowingly made false statements to the Court in his Motion for a New Trial, and we have found from the evidence that the Respondent did knowingly make such false statements.

We have said a disciplinary action is more serious than a civil action, State v. Johnson, 219 Kan. 160, 546 P.2d 1320 (1976), and charges must be established by substantial, clear, convincing and satisfactory evidence. State v. Hoover, 223 Kan. 385, 574 P.2d 1377 (1978); State v. Johnson, 219 Kan. 160. In addition, it is well established the Board's findings and recommendations are advisory only and are not binding on the court. State v. Johnson; In re Phelps, 204 Kan. 16, 459 P.2d 172 (1969), cert. denied 397 U.S. 916 (1970). This court has the duty in a disciplinary action to examine the evidence and determine for ourselves the judgment to be entered. State v. Klassen,

207 Kan. 414, 485 P.2d 1295 (1971).

We have carefully and painstakingly reviewed the voluminous transcripts and exhibits and conclude there is clear and convincing evidence to support the panel's finding that the respondent violated: DR 1-102(A)(4); DR 1-102(A)(5); DR 7-102(A)(5); and K.S.A. 60-211.

In addition, a study of the transcripts, particularly that of the trial of Robinson v. Brady, convinces us that Fred W. Phelps, Sr. meant it when he told Carolene Brady he had wanted to sue her for a long time. The trial became an exhibition of a personal vendetta by Phelps against Carolene Brady. His examination was replete with repetition, badgering, innuendo, belligerence, irrelevant and immaterial matter evidencing only a desire to hurt and destroy the defendant. We note the panel's discussion of DR 7-102(A)(1) and its observation that the

record and testimony show "a course of conduct by the Respondent that indicates the Respondent may have ceased to be an advocate for his client and may be embarked upon a personal vendetta against some persons and is using his position as a lawyer as a weapon." (Emphasis added.) The panel declined to make such a specific finding. We, however, are not bound by the failure to make such a finding. The formal complaint lodged against Phelps states: "That the Motion for New Trial (Attached J) clearly misrepresents the truth to the court and holds a defendant up to unnecessary public ridicule for which there is no basis in fact." We have examined the record and transcripts from Robinson v. Brady, which were made exhibits by the panel and are properly before this court as part of the record in the disciplinary case. This record unquestionably supports a finding that Phelps' action in filing the motion for

new trial attempted to hold Mrs. Brady up to unnecesary public ridicule. Additionally, we find the entire record before us clearly supports a violation of DR 7-102(A)(1).

Respondent claims he was denied due process when the panel denied his motion for discovery. We find the panel's ruling correct. The panel hearing is a type of discovery, with lenient rules to permit respondent to present any defense he might have to the complaint. Respondent relies upon Brotsky v. State Bar, 57 Cal.2d 287, 368 P.2d 697, 19 Cal.Rptr. 153 (1962), to support his claim. This case, however, recognizes the existence of a California state statute allowing discovery in this type of proceeding. See Cal. Bus. & Prof. Code §6085 (West). Kansas law is distinguishable because we have no statutory requirements for discovery under such circumstances. Additionally, we note with approval a

recent Indiana case holding denial of discovery in a disciplinary proceeding is not an unconstitutional denial of due process. Matter of Murray, 266 Ind. 221, 362 N.E.2d 128 (1977). We find the respondent had proper notice of the nature and extent of the complaint and that the hearing was fairly and properly conducted by the panel.

Respondent argues his motion for a new trial and allegations therein referring to proffered evidence are no more than a normal proffer. We do not agree. An oral proffer during the course of a trial is made for the purpose of preserving the record. K.S.A. 60-243(c). The reference to witnesses and their testimony in a motion for a new trial is an attorney's representation to the court that a new trial should be granted because of the quality of proof available. The motion is prepared in the attorney's office and should be carefully and

studiously drafted. It is an attorney's representation to the court and is contemplated by K.S.A. 60-211.

The final determination for the court is the proper discipline for respondent's violations of the Code of Professional Responsibility. In this regard, we note it is proper to consider an attorney's previous record concerning professional conduct. State ex rel. Okl. Bar Ass'n v. Hensley, 560 P.2d 567 (Okla. 1977). See also Selznick v. State Bar, 16 Cal.3d 704, 547 P.2d 1388, 129 Cal.Rptr. 108 (1976). Phelps was suspended from practicing law for a period of two years for unprofessional conduct in 1969. In re Phelps, 204 Kan. 16. The seriousness of the present case coupled with his previous record leads this court to the conclusion that respondent has little regard for the ethics of his profession. In his attorney's oath, Fred W. Phelps, Sr. swore as follows:

> "You do solemnly swear that you will support and bear true allegiance to the Constitution of the United States and the Constitution of the State of Kansas; that you will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that you will not knowingly foster or promote, or give your assent to any fraudulent, groundless or unjust suit; that you will neither do, nor consent to the doing of any falsehood in court; and that you will discharge your duties as an attorney and counselor of the Supreme Court and all inferior courts of the State of Kansas with fidelity both to the court and to your cause, and to the best of your knowledge and ability. So help you God." Rule No. 702(h) (224 Kan. cxxxviii).

He has disregarded that oath, and violated the Code of Professional Responsibility and K.S.A. 60-211. The practice of law is a privilege rather than a right and by his conduct, respondent has forfeited his privilege. We find he should be disciplined by disbarment and assessed the costs of this action.

BY ORDER OF THE COURT, dated this 20th day of July, 1979.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS
OF FRED W. PHELPS, SR.

Case No. ~~80-1001-A~~
80-1152

OPINION AND ORDER
OF THE COURT

After formal notice and hearing before this three-judge court, this matter comes now for decision on the disciplinary proceedings against Fred W. Phelps, Sr. Phelps was disbarred by the Kansas Supreme Court on July 20, 1979, for misconduct arising from the filing of a motion for a new trial in the case of Robinson v. Brady, consolidated cases numbered 125695 and 125742, which was tried in the District Court of Shawnee County, Kansas. The state disciplinary panel found that Phelps misrepresented

certain facts to the Court in this motion for a new trial, and thus violated DR 1-102(A)(4), DR 1-102(A)(5), DR 7-102(A)(5), and K.S.A. §60-211.

The Kansas Supreme Court reviewed the action of the disciplinary panel and found that the findings of the panel were supported by the record, and found additional violations of DR 7-102(A)(1) and Phelps' oath as an attorney. The Kansas Supreme Court ordered Phelps disbarred, even though the disciplinary panel had recommended only censure. State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979).

Following the Kansas Supreme Court's decision, petition for certiorari to the United States Supreme Court was presented and denied [100 S.Ct. 732 (1980)]. While the certiorari proceedings were pending, respondent filed an action in this court, Phelps v. Kansas Supreme Court, et al., to enjoin the implementation of his state

court disbarment, alleging that he was denied due process because the disbarment rules of the Kansas Supreme Court were unconstitutional on their face and in their application. Chief Judge Brimmer, of the District of Wyoming, sitting by designation of the Tenth Circuit after recusement by the Kansas federal judges, filed his opinion dismissing the action for the reason "a review of the Kansas disciplinary rules and the way in which they are applied show that they provide more than adequate due process and equal protection." [Case No. 79-1381, D.Kan., filed Oct. 31, 1979.] No matter or issue in that decision affects the issues or decision in this captioned case.

On January 2, 1980, this Court ordered the respondent to show cause why similar sanctions against respondent should not be imposed in the federal district court. This action was taken pursuant to Local Rule 4A II. Phelps

filed a written response to the Court's order and the matter was heard by a panel of three judges, during which respondent was allowed to present testimony of witnesses, including himself, and argument and briefs.

This judicial proceeding is unique in many respects. It is perhaps the first bar disciplinary proceeding in the federal court in Kansas in many years to be contested on an adversary basis, and it is the first proceeding to be tried under our new local Rule 4A.

It is to be noted that this proceeding is neither an appellate review of previous disbarment proceedings in the Kansas Supreme Court, nor is it designed to rubber-stamp the state court proceedings or adopt its imposed discipline. Our admissions to practice, while separate from state admissions, are necessarily based on the applicant initially passing the Kansas Bar

examination or legally permissible admission otherwise by the State Bar Examiners acting under aegis of the State Supreme Court. Separate type of admission in federal court may result from a lawyer's admission to practice in other federal district courts. Likewise, under the above rule, it is contemplated that most of our disciplinary hearings will be uncontested in the sense that the respondent attorney will not contest the state's factual findings upon which state court disciplinary action is based.

Again, our rule provides that in the contested cases we will take the record before the State Bar Hearing Panel and the Kansas Supreme Court and test our rule criteria against the state findings of fact and judgment as to discipline imposed. In such latter case, as this one is, our multi-judge court must virtually sit de novo in review of the state court proceedings, except for lack of

opportunity to judge credibility of panel witnesses, and the fact that we are compelled under due process to hear live evidence from the respondent.

In performing such judicial duty we are aware of the fundamental importance of close judicial scrutiny, for on the one hand we have the public interest as well as the bar's professional interest in seeing that the highest standards of legal ethics and service prevail in our jurisdiction, and on the other hand, assuring that utmost due process of law occurs to protect a person from losing a right and prerogative surpassed only by life and family, viz., his professional livelihood and his reputation.

This Court's role in this proceeding is necessarily limited. As previously noted, it is the state's primary duty to prescribe standards for admission to the bar and to determine whether an attorney maintains those standards. The effect of

the state determination that an attorney is unfit to be a member of the bar was discussed in Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917). In that case the court held that the state action is binding "unless for some reason it is found that it ought not to be accepted or given effect to ..." 243 U.S. at 51, 37 S.Ct. at 378. The court in Selling set out the reasons which would justify a federal court in not giving full effect to a state determination. These reasons are embodied in our local Rule 4A IID. Under this rule, identical punishment will be imposed unless the face of the record clearly shows:

1. The procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

2. There was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject; or

3. The misconduct established is deemed by this Court to warrant substantially different discipline. Where the Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

THE DUE PROCESS ISSUE

The first attack raised by the respondent is a due process challenge on the decision of the Kansas Supreme Court that Phelps violated DR 7-102(A)(1). The Supreme Court felt that the record disclosed that during the Robinson v. Brady proceedings the respondent ceased to be an advocate and embarked upon some personal vendetta against Ms. Brady. The respondent contends that the issue of whether his conduct violated DR 7-102(A)(1) was not charged in the Disciplinary Administrator's complaint, nor considered before the hearing panel, and the injection of this issue by the Supreme Court denied him due process.

Paragraph 9 of the disciplinary complaint contains the allegation:

> "That the Motion for New Trial . . . clearly misrepresents the truth to the court and holds a defendant up to unnecesary public ridicule for which there is no basis in fact."

It is arguable that this paragraph could serve as due notice of a suspected violation of DR 7-102(A)(1). The thrust of the paragraph, however, is that the respondent made misrepresentations and unfounded statements. This Court need not consider whether the paragraph would serve to put the respondent on notice, since even if it did, the issue was excluded by the hearing panel.

Prior to conducting the hearing, a pretrial conference was held. At this conference the state and the respondent exchanged witness lists. The state identified sixteen witnesses that it might call to establish the improprieties. The respondent's list consisted of 105 named individuals, plus five generic references to individuals

involved in other cases. In an effort to further identify the issues and possibly alleviate the need for hearing from so many witnesses, a pretrial order was entered into where the issues were identified as whether or not respondent had violated:

"1. His oath as an attorney.

2. DR 1-102AR -- 'Engage in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation.'

3. Did he violate DR 1-102A5 -- 'Engage in Conduct that is Prejudicial to the Administration of Justice.'

4. Did he violate DR 7-102A5 --'Knowingly Make False Statements of Fact or Law,' and

5. Did he violate Kansas Statute, KSA 60-211 when he affixed his signature to the Motion for a New Trial?"

The respondent then submitted a revised list of witnesses which consisted of 35 named individuals and four generic references, one of which was to "all law students attending Washburn University

School of Law who have been enrolled in the course teaching professional ethics, which course is and has been taught by J. Richard Foth and Terry L. Bullock since 1974."

It appears from the entry of the pretrial order that the respondent was reasonably led to believe that no other disciplinary rules, or claimed ethical misconduct, would be considered by the panel.

The United States Supreme Court, in In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968), confronted the issue of the due process requirements which necessarily must be present before a state disbarment can be given effect. In Ruffalo, the respondent had originally been charged with twelve counts of misconduct. A hearing was held to consider these charges, and after the respondent testified, a thirteenth charge was added based, at least in part, on the

respondent's testimony. The federal appellate court had disbarred the respondent on the basis of this thirteenth charge. The Supreme Court held that even though the respondent had been given a chance to respond to the thirteenth charge, he had been denied due process because of lack of notice. "The charge must be known before the proceedings commence. . . . This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." (Emphasis added.) 390 U.S. at 551, 552, 88 S.Ct. at 1226. A similar situation is present here. Neither the Disciplinary Administrator nor the panel provided the respondent with notice that he had been charged with violating DR 7-102(A)(1). The panel record is replete with numerous references by both panel members and the attorneys for both the Administrator and

respondent that the misrepresentation issue as to the proffers was the only issue on which respondent was charged and tried. As a result, he presented no evidence or argument on this issue. It is true that the panel's actions were not binding on the Supreme Court, but the Supreme Court relied upon the panel for procedural aspects as well as to gather all necessary facts. The record compiled by the panel was the basis for the actions taken by the Supreme Court. See Kansas Supreme Court Rule 212.

The Supreme Court, in holding as it did that the respondent violated DR 7-102(A)(1), violated the respondent's due process guarantees by denying him both notice of the charge and an opportunity to respond to that charge. The mere fact that the ethical infractions charged against respondent occurred in the course of the trial of Robinson v. Brady, whose record was

necessarily before the Court to illuminate the misrepresentation issue, would in no way allow the enlargement of charges by the Kansas Supreme Court to include other misconduct shown in such record but not noticed and charged by the Disciplinarian and the Hearing Panel. The Kansas Supreme Court cannot justify any enlargement outside the scope of the Ruffalo holding. The Supreme Court's reliance on DR 7-102(A)(1) can serve no basis for action by this court, since as to that charge the first requirement of Selling, embodied in local Rule 4A II D1, is not met.

While we have refused to follow our respected justices of the Kansas Supreme Court on the so-called vendetta issue, we agree with the high court's indignation at the tactics sought to be used by respondent to blacken the character of a defendant remote from facts and issued in a case -- most probably for the purpose of

reaching a plateau of punitive damages. The trial judge in Robinson v. Brady was most correct in denying admission of such evidence. The actions of respondent in attempting to introduce evidence of Ms. Brady's character were clearly improper. In the federal courts character evidence is not admissible to prove a person acted in a given manner. Rule 404(a), Federal Rules of Evidence. And even if germane and relevant on an issue under Rule 404(b), such as showing a pattern of conduct or a basis for justifying an expert scientific opinion, a federal judge has wide latitude to exclude it under Rule 403 on several grounds, among which the most frequently used is that prejudicial effect outweighs probative value. The reason for not permitting such opprobrious evidence is set out in 1 Jones on Evidence, §4.33 (1972):

> "Ordinarily, if the issues in the case were allowed to be influenced by evidence of the character or

reputation of the parties the trial would be apt to have the aspects of a popularity contest rather than a factual inquiry into the merits. The conservative attitude of the courts may be explained on the basis that 'the business of the court is to try the case, and not the man; and a very bad man may have a very righteous cause.'"

THE MISREPRESENTATION ISSUE

There were, however, other ethical violations found by both the Supreme Court and the hearing panel which are not subject to the due process objection. It is these findings which must be more closely examined.

The motion for a new trial filed by the respondent in Robinson v. Brady stated:

"1. Erroneous rulings by the Court as follows:

(a) Rejecting the proffered testimony of R.W. Niederhauser, F.G. Manzanares, Jeff Danner and Richard Waters as follows: That Mssrs. Niederhauser and Manzanares qualified as practicing attorneys to have an opinoin as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that

they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. With regard to the testimony of Jess Danner and Richard Waters, that they qualified as certified court reporters to have an opinion as to the conduct of defendant herein, assuming all relevant facts taken in their best light for plaintiff and construed most favorably to plaintiff, that they in fact had an opinion, and that in their opinion defendant's conduct herein was reckless. Rejecting Niederhauser July 15 and Aug. 1 telephone conversations with one identifying herself as speaking for defendant.

(b) In rejecting the proffered testimony of Ralph J. Hiett, B.L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, as follows: That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation; and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed

as the court reporter for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under the law, the defendant Brady repeatedly "leaked" knowledge of such proceedings to certain of those being investigated by such grand jury and who were later indicted by such grand jury including but not limited to: Morris "Pete" Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called "architectural kickback case", and further included but not limited to the conduct of defendant in "leaking" two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of Kathy Fitzgerald and Karen Kennedy, which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duth. Rejecting Appendix "C" in connection with such proffer.

(c) In rejecting the profered testimony of Patrick Brady, former husband of the defendant Brady, to the effect that the three children of the defendant, Mike, Karen and Laurie, were in fact living with him (Patrick Brady) and away from the defendant Brady during the years 1974 and 1975, the very years when

> the defendant Brady swore on her oath to the United States government and the State of Kansas on income tax returns admitted as evidence in this case that each of said three children were in fact living with the defendant Brady in 1974 and 1975 and that the defendant Brady was therefore entitled to claim each of said three children as her personal exemptions for said years, and further, that custody of the son of the parties, Mike, changed from the defendant Brady to Patrick Brady in 1973, and since that time, the son Mike has been living with Patrick rather than the defendant, and that the only remaining minor child of the parties, Laurie, is now in the custody of Patrick Brady and all in contradiction to the sworn testimony of the defendant Brady and constituting substantial impeachment of the defendant Brady and having strong probative value in the instant case going to the critical question of whether Mrs. Brady or Mr. Niederhauser was telling the truth on vital questions of evidence."

The alleged impropriety was offering the testimony without knowing whether the named individuals would testify in accordance with the proffer, or offering the testimony knowing that the individuals would not so testify.

At the onset of the disciplinary proceedings, the respondent indicated his intention to prove the truth of the alleged wrongs of Ms. Brady. The panel refused to allow the respondent to change the disciplinary proceedings into a trial of Ms. Brady, and so refused to allow in any testimony which went to the alleged truth of character and misconduct of Ms. Brady.

This process does not seem at all subject to question. The oral proffers and written motion specified that certain people would testify in certain ways. The misrepresentation alleged was in falsely stating that those listed people would testify in the manner indicated in the motion. The panel repeatedly stated that the issue of ethical impropriety of respondent depended on whether Phelps had reasonable grounds to believe the designated witnesses would testify as he represented.

The respondent claims that the panel sustained objections to numerous questions and that this action resulted in a denial of due process. The respondent, however, was allowed to ask the questions of the witnesses and the witnesses were allowed to answer as a proffer of that testimony. Although the testimony was presumably not weighed by the hearing panel, it was included in the record before the Supreme Court and is present in the record before this Court. This Court has considered the proffered testimony as a viable part of the record and the action taken by this Court is taken in light of all the record, including this proffered testimony.

Although this Court generally favors a more liberal approach to the admission of testimony than the approach taken by the hearing panel, any errors by the panel in excluding evidence do not approach the level of a due process violation.

Since this Court finds that the respondent was accorded due process with respect to the charges of misrepresentations, it must consider whether the record contains "such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final the conclusion on that subject."

The standard of review of the factual findings of the panel and the Kansas Supreme Court is critical to the determination of this case. The Court certainly is not to reweigh the evidence and judge de novo the credibility of witnesses on the basis of the cold record. Certainly, the conflicts in testimony between the state witnesses and the witnesses called by the respondent could have led the panel to believe that either the state's or the respondent's witnesses were untruthful. This Court is also

cognizant of the deference which should be paid to state determinations. See Matter of Abrams, 521 F.2d 1094, 1105 (3d Cir. 1975) (Rosenn, J. concurring). This Court believes as to the factual basis of the state action, the proper standard is one analogous to the standard applied to appellate review of criminal cases. This Court must view the evidence in the light most favorable to the state to decide if there is sufficient substantial, clear and convincing proof, direct and circumstantial, together with reasonable inferences to be drawn therefrom, from which the panel and the Kansas Supreme Court might find the respondent guilty of the alleged ethical improprieties. See United States v. Harris, 534 F.2d 207, 213 (10th Cir. 1975).

This Court must also consider whether the standard of conduct imposed by the Kansas Supreme Court is binding on this Court. K.S.A. §60-211 is similar to

Rule 11 of the Federal Rules of Civil Procedure. It provides that an attorney's signature on a pleading indicates that the attorney has "good grounds" for that pleading. The Kansas Supreme Court and the hearing panel construed this requirement in the context of this case to require that an attorney proffer testimony only when he has a "reasonable basis" that the individual would testilfy in the manner represented.

The states have great, if not total, discretion in prescribing acceptable standards of conduct for attorneys. As stated in In Re Sareless, 360 F.2d 794, 797 (N.D.Ill. 1973):

> "In sum, whether or not an attorney's acts indicate a lack of the upright professional and private character necessary to demonstrate or to maintain his good standing remains a matter of judgment for the states to determine for themselves, within, of course, the broad confines of due process protection of fundamental freedoms."

Two concurring justices in In Re Ruffalo, supra, would have held:

> "That a federal court may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct."

390 U.S. at 556, 88 S.Ct. at 1228 (White, J. and Marshall, J. concurring). The fact that this position was not accepted by the Court again speaks of the great deference given state prescribed standards of conduct. In Re Sareless, supra, 360 F.2d at 797. A deviation from the state standard of conduct may create tension between the state and federal judicial systems. An adoption of a different standard could carry an implicit criticism of the state standard. Imposing a lesser standard in one system may lead to a faltering of public confidence in the judiciary's ability to maintain an ethical and competent bar.

Principles of comity and federalism alone could lead this Court to accept the state adopted standards.

This Court, however, also embraces the state standard, since that standard appears to be just and correct. The defendant argues that the "reasonable basis" standard potentially subjects an attorney to discipline for acts of mere negligence. The Court sees nothing wrong with imposing discipline for conduct which is negligent. Negligence concepts play an important role in several disciplinary rules beyond their axiomatic role in fault finding in civil and some criminal actions. See, e.g., DR 2-106(B), DR 4-101(D), DR 6-101(A)(1), and DR 7-107(B), (D), (H), and (J). In addition, the reasonable basis test is utilized in DR 7-106(C)(1) and (C)(2). These rules provide:

> "In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(b) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person."

The adoption of the "reasonable basis" test seems to be a natural outgrowth of the obligations of K.S.A. §60-211 and the ethical considerations which govern attorneys.

The respondent argues that in making proffers of testimony, a subjective belief, even if that belief is unreasonable, is sufficient to justify making a proffer. This Court further permitted the respondent to presnt as amicus curiae a dissertation in person in open court by Dr. Monroe E. Friedmann, a well-known national authority on the subject of legal ethics, whose position was that an attorney should be bound only by a subjective standard as to his belief

in the truthfulness of a proffer of evidence. The Court believes that adopting such a standard would be tantamount to providing unscrupulous attorneys a license to abuse the legal process. In fulfilling the public trust placed on all members of the bar, an attorney should always be able to articulate some objective basis for the actions which that attorney takes.

Nor can the respondent shield himself as a "reasonable man" through reliance alone on the basis of the report and opinion of his investigator Ralph Hiett as to what a witness would testify. All of the judges of this Court wholeheartedly concur with the observations of both the hearing panel and the Supreme Court as succinctly set forth in their respective opinions.

The reasonable basis test is thus a sufficient test to find a violation of K.S.A. §60-211. Moreover, the panel and

the Kansas Supreme Court went further, finding on the basis of the record that the respondent knowingly made false statements of fact in the motion for a new trial.

This Court, from its minute examination of the entire record in both Robinson v. Brady, and the disciplinary hearing before the panel, finds the panel of distinguished attorneys as to the whole case to have performed in a most competent judicial capacity. They correctly read the complaint, framed the factual issue, and tried the case on the question of whether respondent Phelps had reasonable cause to believe that the proffered testimony of the witnesses would be as stated in both the oral proffer and the written motion for new trial. The record irrefutably indicates that the panel at no time read the complaint or framed an issue of misconduct on the harassment or vendetta

issue subsequently adopted and emphasized by the Supreme Court.

This Court, likewise, in applying the clear and convincing evidence before the panel on the misrepresentation issue, believes the panel judges' conclusion to be correct, that respondent Phelps had no reasonable basis for believing some witnesses would testify as he stated in the proffers for the very basic reason that Phelps had been told by the witness personally, prior to the times of proffer, that the witness would not so testify, or that the witness had told no one he would testify as represented.

Included in this category of witnesses whose testimony the panel found, and this Court finds, were misrepresented by Phelps, are Dan Turner, Richard Brewster, Rodney Joyce, Kathleen Fitzgerald, and B.L. Pringle. However, as to part of these witnesses, eliminating the credibility factor which

seemed minimal if not nonexistent as to virtually all of them, this Court does find that there was no clear and convincing proof of misrepresentation as to the testimony of the witnesses Patrick Connolly, Patrick Brady, and Jess Danner. This Court agrees with the panel finding that the representation as to the content of Richard Waters' testimony was true.

Therefore, this Court will only point out its disagreement with both the finding and judgment of misrepresentation on the three witnesses mentioned.

As to Patrick Connolly, this Court finds that the total information which respondent had available to him from all sources, but principally including Vern Miller, as State Attorney General, Connolly, Hiett, and other evidence, would lay a reasonable basis to conclude that Connolly would testify as stated. Indeed, the panel clearly misread Connolly's testimony in that all Connolly

ever said was that he was not asked specific questions about Caroline Brady's reputation for truth, or about Brady leaking grand jury proceedings (or about Brady leaking the transcripts taken by Turner in the Glenn matter). Connolly actually never denied the substance of the proffered testimony.

> "Q. (By Mr. Focht) What your testimony really is, that you didn't tell him you wouldn't have answered that way; you didn't tell you would have, those questions were just not asked, is that right?
>
> A. That is correct."
> (Hearing Panel transcript, p. 132.)

As concerns the panel testimony of Patrick Brady, the most accurate appraisal summation would be that it was confusing, laced with episodes of lack of memory, sometimes inhibited by panel rulings on germane evidence, and generally when the true facts are synthesized from the welter of examination, corroborative of the

essential allegations proffered by the respondent in paragraph C of the proffer as to Brady.

In analyzing Danner's testimony, the whole tenor of it gives an aura of much less than clear and convincing. He says repeatedly he can't remember the word content of the conversation, couldn't even remember whether he talked to Phelps or someone else questioning him on Phelps' behalf. He does admit that he told the interviewer about the conduct of Brady in leaving the mandamus hearing after she was told that a transcriber had been provided. He just remembers he didn't use the word "reckless" or anything of similar meaning. He also admitted he would not have followed Brady's conduct, implying it was a deviation from her duty.

"Reckless" is a word of many meanings in a conclusory sense, and probably was the one Phelps thought was

descriptive and summarized her conduct from his (Phelps) apprehension of Danner's description of Brady's conduct as a reporter. Our conclusion is Phelps could reasonably conclude that the substance of Danner's testimony would indicate deviant or careless reportorial conduct by Brady.

THE JUDGMENT

Having reached our conclusions on what we believe and find to be the true facts and the applicable law, it is necessary to determine a just result. Reluctantly, but of necessity, under the first part of our Rule we must decline to accept the State Supreme Court's finding and judgment relative to respondent being guilty of misconduct under DR 7-102(A)(1), for illegal harassment of and carrying on a vendetta against Ms. Brady.

As to the requirements of parts two and three of our Rule, except as to three

of the witnesses noted, we find confirmation in the record of misconduct of respondent as to the issue of misrepresentation of proffered testimony of witnesses.

Finally, we confront the last part of our Rule on what judgment should be imposed on respondent on the basis of our findings and legal conclusions. As here reflected in the total opinion there is a variance of judicial opinion as to the quantum of sanctions the Court shall apply to respondent. In view of the previous ethical transgressions of Mr. Phelps, as reflected in In Re Phelps, 204 Kan. 16, 459 P.2d 172 (1969), for a series of acts of attorney misconduct directed toward his clients, the members of this Court are unanimous in their belief that the public interest requires cessation of respondent's privilege to practice law in the federal courts. In this matter, and the most recent state court disciplinary

proceedings, the charged misconduct has been against the integrity of our system of justice and the Court itself. A majority of this Court feel that since the offense here, while a grave one, is novel and unique as to judicial precedent. It is likewise one in which the line between negligent and willful conduct is not all clear, and lawyers may not be as aware as they should be of the pernicious nature of conduct such as was involved in this case. The majority note and respect the conclusion our esteemed colleague, Judge Stanley, draws from the appearance and testimony of respondent, as reflected in his dissenting opinion on the extent of the penalty. However, other plausible inferences may also be drawn. We draw a benign inference from the quoted testimony. Unless the mental frame of mind of this respondent be amoral, which we cannot determine, a majority of this Court is impresssed with the moral

background and the character opinion expressed by some very respected witnesses testifying on behalf of respondent. It is likewise apparent to the entire Court that respondent is an extremely intelligent individual, as well as being an exceedingly competent attorney when he observes the legal amenities.

It is therefore the opinion of the majority of this Court that rather than imposing the permanency of complete disbarment, a period of substantial suspension of the respondent as an attorney of the federal bar is a just result.

IT IS THEREFORE THE JUDGMENT OF THIS COURT that Fred W. Phelps, Sr. be, and he is hereby, suspended from practice in the United States District Court for the District of Kansas for a period of two years.

IT IS FURTHER ADJUDGED that this judgment be effective on and after thirty days from the date it is filed with the Clerk of this Court.

IT IS FURTHER ORDERED that the Clerk transmit certified copies of this judgment to the Clerk of the Tenth Circuit Court of Appeals and to the National Disciplinarian Data Bank of the American Bar Association.

Dated this 30th day of October, 1980.

(Signed) Frank G. Theis, Chief Judge

(Signed) Dale E. Saffels, Judge

(Signed) Arthur J. Stanley, Jr., Judge

OPINION OF JUDGE STANLEY
DISSENTING IN PART

I am in complete agreement with the court's finding that the respondent's guilt on the charges of violation of Disciplinary Rules DR 1-102(A)(4) and (5)

and K.S.A. 60-211 was established in the state court proceedings. I agree also that as to those charges the state court proceedings were untainted by any infringement of his constitutional rights. I dissent from that part of the decision imposing only the sanction of suspension.

The practice of law is, or should be, much more than a vocation. A lawyer on his admission to the bar takes on multiple responsibilities. He is bound by his oath to deal fairly and honestly not only with his clients but with the courts in which he practices and with his professional brethren.

The public lacks independent means by which to determine a lawyer's integrity and professional competence and must rely upon his membership in the bar as evidence that he possesses those qualities. Members of our bar are admitted pro hac vice by other courts,

state and federal, by virtue of such membership. Membership of a lawyer in the bar of this court is in effect a continuing declaration by the court that he is personally honest and professionally competent. A court which has determined that a member of its bar is guilty of serious professional misconduct should, in the exercise of its duty to the public and to other courts, revoke the credentials of a lawyer who is found wanting. Criteria which should be considered in determining the sanction to be imposed in disciplinary proceedings have been stated as including the seriousness and circumstances of the offense, avoidance of repetition, deterrent effect upon others, maintenance and respect for the honor and dignity of the legal profession, and assurance that those who seek legal service will be insulated from unprofessional conduct. In Re Smith, 83 Wash.2d 659, 521 P.2d 212,

215 (1974); Office of Disciplinary Council v. Leopold, 469 Pa. 384, 366 A.2d 227 (1976).

In 1969 the respondent was found by the Supreme Court of Kansas to have violated the canons of professional ethics in three separate and distinct matters, each involving his relationship with a client. In Re Phelps, 204 Kan. 16, 459 P.2d 172, cert. denied, 397 U.S. 916. In the state court proceeding giving rise to this case it has been established that he lacks commitment to his responsibility to the courts and to his fellow lawyers. State v. Phelps, 226 Kan. 371, 598 P.2d 180, cert. denied, 444 U.S. 1045. I am not unmindful of the fact that disbarment is an extreme penalty and that it should be reserved for serious misconduct. I regard the respondent's misconduct as serious. He apparently does not. At the hearing before us when asked by his attorney:

"Q. If you were retrying that case today, even in light of what you now know and the difficulties and the hearings you have been through, if the state of evidence were the same would your actions be the same today?

A. Yes, sir." (Tr. 36.)

To me it appears that the respondent not only is unrepentant but sees nothing wrong in the actions found by the court to have been blameworthy.

In a California case quoted by Orie L. Phillips and Philbrick McCoy in Conduct of Judges and Lawyers (Parker & Co., Lost Angeles, CA, 1952), the court says:

"But when in a disbarment proceeding it is established by evidence amounting to proof, that an attorney and counselor has been dishonest in dealing with the affairs of his client; and has violated the duty which he owes to 'never seek to mislead the judge or any judicial officer by an artifice or false statement of law' . . . then a refusal to order disbarment amounts to a renewal of the original

license, and is a declaration that in spite of his own record, the attorney is fit to be offered to the public as one who safely may be trusted. In this case the court has no reasonable alternative. The petitioner has disbarred himself." Roark v. State Bar, 5 Cal.2d 665, 55 P.2d 839.

I would disbar the respondent.

(Signed) Arthur J. Stanley, Jr., Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

IN THE MATTER OF THE
DISCIPLINARY PROCEEDINGS
OF FRED W. PHELPS, SR.
Respondent-Appellant

No. 81-1022

Appeal From The
United States District Court
For The District of Kansas
(D.C. No. 80-1152)

Robert D. Ochs, Fisher, Ochs and Heck, Topeka, Kansas, and Fred W. Phelps, Jr., Phelps, Phelps and Phelps, Topeka, Kansas, for Respondent-Appellant.

Before SETH, Chief Judge, BARRETT AND DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The cause before us calls for review of proceedings which took place in the United States District Court for the District of Kansas, wherein a three-judge court considered disciplinary charges

which had been brought against the attorney in question, Fred W. Phelps, Sr., a member of the Kansas Bar. The proceedings in the federal district court were follow-ups on similar proceedings which had been taken in the courts of Kansas. The Kansas Supreme Court ordered that Phelps be disbarred.

Phelps, in the Kansas court and here, is charged with making false statements to the court in tendering testimony, in his motion for new trial which referred to the nature of the testimony which would be presented by certain witnesses in the case of Robinson v. Brady in which he was appearing as an attorney, which case was heard and tried in the District Court of Shawnee County, Kansas. The specific statutory charge against Phelps was violation of K.S.A. 60-211 when he affixed his signature to the Motion for a New Trial in the Robinson v. Brady case. The particular

disciplinary rules which he was charged with violating were:

> DR 1-102 A 4 (engaging in conduct involving dishonesty, fraud, or misrepresentation);
>
> DR 1-102 A 5 (engaging in conduct that is prejudicial to the administration of justice); and
>
> DR 7-102 A 5 (knowingly making false statements of fact or law).

The state disciplinary panel found that Phelps had violated the above statute and ethical provisions, and recommended that he be censured. The Kansas Supreme Court found the findings of the panel to be supported by the record and found additional violations of DR 7-102 A 1 for illegal harassment of and carrying on a vendetta against Ms. Brady, one of the litigants in the case in question, and Phelps' oath as an attorney. The result of all of these determinations was an order that Phelps be disbarred. Petition for certiorari to the United States

Supreme Court was filed, presented and denied. 100 S.Ct. 732 (1980).

Following the Kansas proceedings, the United States District Court for the District of Kansas issued an order directed to Mr. Phelps to show cause why similar sanctions should not be imposed against him in the federal district court. Thereafter a hearing was conducted by a panel of three judges, during which Phelps was allowed to present briefs and testimony of witnesses, including himself. The district court refused to impose the same discipline as that imposed by the Kansas Supreme Court; it acted on the ground that the state court decision was unconstitutionally based in part on the DR-7-102 A 1 charge, which was not listed in the Disciplinary Administrator's complaint nor considered by the state hearing panel. The district court held that since Phelps had no notice of that

charge, and no opportunity to respond thereto, that he had been denied due process of law, and under local Rule 4A 11D the district court should not impose the same sanctions imposed by the state court.[1] As a consequence, the district

---

1. Under the Local Rule 4A-11D, the district court will impose identical sanctions as those imposed by the state court unless the record shows that:

   1. the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

   2. there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duty, accept as final the conclusion on that subject; or

   3. the imposition of the same discipline by this court would result in grave injustice; or

   4. the misconduct established is deemed by this court to warrant substantially different discipline. Where the court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

court considered only the charges cited in the original complaint against Phelps, and found that Phelps had violated DR 1-102 A 4, DR 1-102 A 5, DR 7-102 A 5, and KSA 60-211. Phelps was suspended from practice in the United States District Court for the District of Kansas for a period of two years and he now appeals from that order.

The contentions raised by Mr. Phelps are as follows:

I. That the decision of the district court violates the Supreme Court's decision In Re Ruffalo, 390 U.S. 544 (1968), since the Kansas Supreme Court denied appellant due process of law when it found him guilty of violating DR 7-102 A 1, because Phelps had not been given notice of that charge and had been denied an opportunity to respond thereto.

II. That he was denied due process of law because the disciplinary action in the district court did not "embody a proper application of governing legal precepts".

III. That the district court incorrectly relied on the determination of the Kansas court that it must find that

there was a "reasonable basis" for an attorney's belief that a witness would testify in a manner the attorney stated he expected the witness to testify to. Appellant argues that a proffer is merely an expression of expectations on the part of the lawyer and that a subjective test rather than an objective one should be applied when judging whether an attorney has made a truthful proffer.

IV. That appellant was denied due process of law because the district court failed to allow him to present a closing argument to the hearing panel.

V. That the standard of review employed by the district court was invalid, and that significant consequences followed therefrom.

VI. That there was no clear and convincing evidence in the record which established that Phelps had no reasonable basis to expect that these witnesses would testify in a manner that Phelps stated that they would testify.

I.

The district court correctly held that the defendant had been deprived of his rights under the due process clause in accordance with In Re Ruffalo, 390 U.S. 544 (1968), when the state court found him

guilty of violating DR 7-102 A 1, the charge in which he had not been given notice. Therefore, the district court did not follow the judgment of the State Court on that issue. It rendered instead its judgment solely on the misrepresentation issue. Phelps maintains that under Ruffalo, if the state judgment was based partly on a charge that appellant had neither notice of nor an opportunity to respond to, the court should not impose any discipline on appellant. This we disagree with.

In Ruffalo the Supreme Court did not state that if the findings of the state court are based in any part on a charge denying an attorney due process of law, that all charges would thereby become a nullity. Ruffalo merely stands for the proposition that courts may not impose discipline on an attorney based upon specifications with respect to which the

attorney had not received notice. In Ruffalo, the Supreme Court specifically stated that the court of appeals had only considered the charge which the Supreme Court found to not have afforded the attorney due process of law, since the attorney had not been given notice of that charge (charge no. 13). 390 U.S. at 547. While the state court had disbarred the attorney on two grounds (one of which the attorney did have notice of), the court of appeals did not address the charge which the attorney had been given notice of. In this case, however, the district court suspended Phelps because of conduct of which he had been originally charged in the complaint. We hold that the district court's reading of Ruffalo was correct, in that it does not require that the entire proceeding be held void simply because there was a failure to give notice on one charge. The district court was not precluded from disciplining

Phelps under the charges which were specified and with respect to which he was given notice under the doctrine of In Re Ruffalo.

II.

Phelps alleges that he was denied due process of law because the disciplinary action of the district court did not "embody a proper application of governing legal precepts." See Matter of Abrams, 521 F.2d 1094 (3rd Cir. 1975). Appellant relies on Abrams for the proposition that since the court's decision must "embody a proper application of governing legal precepts," he should not be disciplined for conduct which was not previously judicially announced. In so contending, however, appellant has misread that case. The Third Circuit found in Abrams that the district court had not applied governing legal precepts because when imposing more serious discipline upon the attorney

(disbarment) than that imposed by the state court (suspension for one year), the district court relied upon an earlier state case which was explicitly distinguished by the state supreme court when the state considered the case against Abrams. The Third Circuit held that the governing legal precept which the district court should have applied was the state court's decision regarding Abrams, and not an earlier case which was discredited.

It is quite true that appropriate action by the federal court must be in accordance with application of governing legal precepts. The question is, what are governing legal precepts? The fact that no prior cases have considered this particular ethical charge involving misrepresentation contained in a motion for new trial does not mean that such conduct cannot constitute an ethical violation. In other words, the facts rule the issue.

The disciplinary rules which Phelps is charged with violating giving sufficient notice of the type of conduct which is grounds for disciplinary action. Under DR 1-102 A 4, a lawyer is prohibited from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Recognition of fraud or deceit does not require use of examples. Disciplinary Rule 1-102 A 5 provides that a lawyer may not engage in conduct which is prejudicial to the administration of justice. Disciplinary Rule 7-102-A 5 prohibits a lawyer from knowingly making a false statement of law or fact. It is not necessary that the Rules list each and every instance in which a lawyer may possibly violate these Rules, and it is unnecessary that there must have been previous judicial construction of the Rules in order for governing legal precepts to exist.

III.

Appellant maintains that the district court incorrectly relied on the determination of the Kansas Supreme Court that it must find that there was a "reasonable basis" for an attorney's belief that a witness would testify in the manner the attorney stated he expected the witness to testify. Appellant's view is that since by definition a proffer is merely an expression of expectation, a proffer of testimony in a motion for new trial should be judged by subjective inquiry rather than objective inquiry in deciding whether an attorney made a truthful proffer. That is, since the test is "what does the attorney expect the witness to testify to?", the attorney's expectations must be judged subjectively.

Defining the term "proffer" is only the beginning of our inquiry, however. We must further inquire as to what is an

expectation. As the Kansas Supreme Court said, written references to expected testimony of witnesses in a motion for a new trial constitute a representation to the court that a new trial should be granted because of the quality of proof available. If such a motion is prepared in an attorney's office, it ought to be carefully and studiously drafted, inasmuch as the attorney is representing to the court, in accordance with KSA 60-211, the facts that the witness will testify to. (Opinion of the Kansas Supreme Court, p. 19). It is plain, then, that a written proffer expressing an expectation of testimony has to be based not on mere conjecture or wishful thinking, but on actual knowledge and thoughtful reasoning. Thus the attorney must have concluded that there were logical and factual reasons for arriving at his expectation. To hold that the only rational test in a disciplinary context

is whether the attorney had any basis at all upon which to arrive at an expectation is not acceptable. If this were true any attorney could, consistent with the Rules of ethics, sign his name to a totally irrational or unrealistic complaint, proffer, affidavit or pleading.

There are other facets which apply to this question.

First, the district court held that appellant had knowingly misrepresented facts in his proffers. Therefore, even if a general subjctive test were applied, under such a test the district court would still have found the appellant guilty of misconduct.

Second, a pure subjective test would allow any attorney, at any time, to say, "well, I believed that," and no court could ever impeach him. This is surely an undesirable way to approach the matter because a court would be compelled to accept whatever an attorney said and

grant a new trial on that basis. A standard of this kind would be unrealistic and would be out of harmony with the entire purpose of the Code of Ethics.

IV.

WHETHER THE DISTRICT COURT ERRED IN DENYING APPELLANT AN OPPORTUNITY TO PRESENT A CLOSING ARGUMENT.

The answer is no. First, there is a due process right to present closing arguments in criminal cases. Herring v. New York, 422 U.S. 853 (1975). The present proceedings, although quasi criminal, are not criminal. In Re Ruffalo, supra, 390 U.S. at 551. The rules in a disciplinary proceeding are less exacting. Randall v. Brigham, 74 U.S. (7 Wall) 523 (1869). The standard in the present proceedings is one of permitting the attorney a fair opportunity to present his case. In this case Phelps received a fair opportunity to present testimony, briefs and suggeted

findings. No formal closing arguments were required.

V.

WHETHER THE STANDARD OF REVIEW WHICH WAS FOLLOWED BY THE COURT WAS CORRECT AND IF NOT, WHETHER IT WAS PREJUDICIAL.

The district court recognized that the proceeding in that court was not an appellate review of previous disbarment procedures in the Kansas Supreme Court. It recognized that it must virtually sit de novo in review of the state court proceedings, except for lack of opportunity to judge the credibility of panel witnesses and the fact that it was compelled under due process to hear live evidence from the respondent as well. Nevertheless the court stated that the standard to be applied when reviewing the factual basis of the state action was the standard applied when conducting an appellate review of criminal cases. It said:

> This court must view the evidence in the light more favorable to the state to decide if there is sufficient substantial, clear and convincing proof, direct and circumstantial, together with reasonable inferences to be drawn therefrom, from which the panel and the Kansas Supreme Court might find the respondent guilty of the alleged ethical improprieties.

(Opinion, p. 12, emphasis added).

We have recently held that it is the responsibility of the district court to virtually sit de novo in review of the state court proceedings except for hearing and considering anew live testimony, and to independently test the district court rule against the state findings of fact. In Re Gordon (Nos. 80-1613, 80-8010, 10th cir. 1980). This is in accord with the Supreme Court's decision in Selling v. Redford, 243 U.S. 46 (1917). The Supreme Court held in Selling that in deciding whether to recognize and apply the disciplinary decision of the state court, the federal

court should engage in an intrinsic consideration of the state record and determine whether the attorney was denied due process in the state procedure, whether the record lacks clear and convincing factual proof of misconduct, or whether there exists some other grave reason which would render application of the state court penalty an injustice. Kansas Rule 4A, IID embodies the factors set forth in Selling which call for an independent review.

Accordingly, then, the statement by the district court that it should apply a standard of appellate review in a disciplinary hearing is not correct. Thus the evidence should not be considered in a light most favorable to the state. The district court is obliged to review the evidence independently and determine whether there is clear and convincing proof that Phelps was guilty of misconduct. This leaves us with only

one alternative, which is to ascertain whether or not it appears that the error was serious or was not prejudicial. After evaluating the evidence, we conclude the latter.

VI.

The finding in the district court was that Phelps had misrepresented his proffered testimony of the following proposed witnesses: Dan Turner, Richard Brewster, Rodney Joyce, Kathleen Fitzgerald and B.L. Pringle. The question is whether there is clear and convincing evidence in the record showing that Phelps had no reasonable basis to expect that these witnesses would testify in the manner that Phelps stated they would testify. Turning now to the testimony which was proffered in the motion for new trial, Phelps stated the following in regard to his proffer of how these five witnesses would testify:

That each such person had relevant knowledge of the defendant Brady, knew her reputation in the community for truth and veracity, and that such reputation was bad; further, that from their knowledge in the community they had an opinion as to the truthfulness and veracity of defendant, and as to the attitude of defendant toward her oath or other solemn obligation to speak the truth and be bound by any such oath or solemn judicial obligation, and that in their opinion defendant was not a truthful person and had scant regard toward her oath or any such solemn obligation, and further, that they had knowledge of specific instances of conduct by defendant including but not limited to the conduct of defendant when employed as the court reporter for two separate grand jury investigations in Shawnee County, and wherein the defendant Brady had a sworn duty not to reveal such grand jury proceedings to outsiders, and to maintain all such proceedings in strict secrecy, and notwithstanding such bounden and solemn duty under the law, the defendant Brady repeatedly "leaked" knowledge of such proceedings to certain of those being investigated by such grand jury including but not limited to: Morris "Pete" Peterson; Gary Guerrero; Peggy Guerrero; the brother of Governor Robert Docking; and others connected to the so-called "artichitectural kickback case", and further included but not limited to the conduct of defendant in "leaking" two confidential transcripts taken by Dan Turner in his investigation of a matter involving Bill Glenn, such statements being sworn statements of

> Kathy Fitzgerald and Karen Kennedy, which statements were taken in secrecy and for which the defendant was bound to secrecy and which were delivered by Mrs. Brady to the news media and consequently published in violation of her solemn oath and duty. Rejecting Appendix "C" in connection with such proffer.

The question is whether Phelps had a reasonable basis for believing that these people would testify that they knew Brady's reputation in the community for truth and veracity was bad, that they personally believed Brady to be untruthful, and that they had knowledge of specific instances of conduct by Brady whereby Brady had violated her oath as a court reporter by leaking information contained in secret proceedings to outsiders.

Now, we must look to the testimony.

A. Dan Turner:

Ralph Hiett, a private investigator, testified that he told Phelps that based on conversations that Hiett had with other people, and not Dan Turner himself,

that Turner would testify that Brady was not truthful and that Brady's reputation for truthfulness was bad. Hiett testified that he had not told Phelps one way or the other whether Hiett had personally talked to Turner.

William Glenn, an attorney, testified that information obtained in a confidential deposition involving Glenn as a defendant was "leaked" to the news media. Glenn testified that the only person present at that confidential proceeding other than Glenn himself were Dan Turner, Kathy Fitzgerald and Karen Kennedy (who were testifying against Glenn), and Brady (who was the court reporter). Glenn stated that he had been told by the person who published the information in the media that the information had not been given to the media by Mr. Turner, and that Glenn had relayed that information to Hiett and Phelps. Further, Glenn stated that he

told Phelps that Fitzgerald and Kennedy had not leaked the information to the media; that Turner was very upset about the leak, and that Turner had made a statement that he felt Brady was the one who leaked the information to the media.

From this testimony Phelps could have reasonably believed that Turner would testify that in his opinion Brady was untruthful. In addition, it is possible that Phelps could have reasonably believed that Turner would testify that Brady's reputation for truthfulness was bad. That's as far as it goes, however. There is no evidence that Phelps had any basis at all for believing that Turner had knowledge that Brady had leaked information to outsiders. All that was to be gleaned from Glenn's statements is the possibility that Turner believed that Brady leaked the information; not that Turner knew Brady leaked the information. Phelps,

therefore, was relying on innuendos. Even giving Phelps the benefit of every doubt we have to agree that the record contains clear and convincing evidence that Phelps had lacked a reasonable basis to expect that Turner would testify as Phelps said Turner would testify.

B. Kathleen Fitzgerald:

Phelps testified that Ms. Fitzgerald had told him that she did not want the information regarding the Glenn matter published, that she was upset that the information had been leaked, and that she had heard that Brady could not be relied on. Mr. Hiett testified that he had been told by Ms. Fitzgerald that she believed that Brady had leaked the story, since in her opinion Mr. Turner would not have done so.

The basis for Phelps proffer as to Ms. Fitzgerald's testimony is substantially the same as his proffer regarding Dan Turner's testimony. Phelps

was intending to show that Ms. Fitzgerald did not want the information regarding the Glenn matter publicized; that neither Turner, Kennedy or Fitzgerald had leaked the information to the press; and therefore, that it logically followed that Brady had leaked that information. This reasoning does not imply actual knowledge. Again, while it may have been possible for Phelps to have reasonably believe that Ms. Fitzgerald would testify that in her opinion Brady was untruthful and that Brady's reputation for truthfulness was bad, there is no evidence to show that Ms. Fitzgerald had any knowledge at all that Brady had leaked the information. Accordingly, the record contains clear and convincing evidence that Phelps had no reasonable grounds to expect that Ms. Fitzgerald would testify in the manner that Phelps said she would testify.

C. Richard Brewster and Rodney Joyce (Reporters):

Mr. Hiett testified that he had inquired of Mr. Brewster over the telephone as to how Brewster obtained the information that Channel 27 News published in regard to the Bill Glenn matter. According to Hiett, Brewster told him that he had not received the information from Dan Turner; that the source of his information was confidential. Hiett also stated that Brewster said that he knew that Brady was a notorious liar. Hiett relayed all this information to Phelps.

Phelps testified that although he had spoken to Brewster on the telephone, Brewster had not said whether he would or would not testify as Phelps said Brewster said he would testify.

Hiett testified that he told Phelps that Rodney Joyce would testify that Brady was untruthful. Hiett also told Phelps that Joyce knew Brady had a reputation for violating her oath. Hiett

further testified, however, that Joyce indicated during a telephone conversation that he would maintain the confidentiality rule, and that he would not discuss Brady's reputation.

Phelps testified that he believed that if Joyce were on the witness stand, since Joyce had since gone to law school, that the "lawyer" would prevail over the "reporter", and Joyce would testify regarding Brady's reputation. Phelps stated that at one time Joyce indicated to Phelps by telephone that he had some knowledge of Brady's reputation from his work in the Glenn investigation.

The evidence shows that while Phelps could have reasonably hoped or expected Brewster to testify that he believed Brady to be untruthful, and that Brady's reputation for truthfulness was bad, there is no evidence to show that Brewster had knowledge that Brady had leaked information to outsiders on any specific

occasion. Further, the evidence clearly shows that not only was there no reasonable basis to believe that Joyce had knowledge that Brady had ever leaked information to outsiders, there was no reasonable basis to believe that Joyce would testify as to Brady's reputation for truthfulness. Thus, there is clear and convincing evidence that Phelps lacked reasonable grounds to expect that Brewster and Joyce would, in fact, testify in the manner that Phelps said they would testify.

D. B. L. Pringle:

According to Phelps, he planned to call Mr. Pringle, an attorney, as a witness to give testimony about a prior similar incident involving Brady's failure to provide a criminal transcript. To that end Mr. Hiett testified that Pringle told Hiett that Brady did not provide him with a transcript when such was required, and that as a result, Pringle did not trust Brady and stated he

would never use her again as a court reporter. Hiett gave this information to Phelps, and Phelps also talked to Pringle regarding this matter. This expected testimony, however, is not even mentioned in Phelps' proffer, and, therefore, is irrelevant to this case.

Mr. Hiett testified that he told Phelps that Pringle told Hiett that Brady was not trustworthy, and that she had relationships with other lawyers for the purpose of getting court reporting business. Further, Hiett testified that he told Phelps that Pringle was knowledgeable about the grand jury proceedings about which Phelps alleged Brady had leaked information. Hiett stated that Pringle indicated that he had agreed with Hiett's belief that Brady was leaking information. On cross-examination Hiett testified that he had never asked Mr. Pringle if he would testify to those matters; that he was only referring to how Pringle "felt".

Phelps testified that he had never discussed with Pringle the issue of whether Pringle would testify regarding the grand jury matter or about Brady's reputation.

While there may have been reasonable grounds for Phelps to have expected that Pringle would testify to his belief as to Brady's truthfulness, or to Brady's reputation for truthfulness, there is no evidence to show that Pringle had any knowedge that Brady had leaked information at any time. According to the evidence, Hiett told Pringle that he, Hiett, believed that Brady was leaking information, and Pringle indicated that he agreed. This evidence provides no basis for an expectation that Pringle had any knowledge whatsoever of such matters. The evidence is clear and convincing that Phelps had no reasonable grounds to expect that Pringle would testify in the manner that Phelps said he would testify.

CONCLUSIONS

We are of the opinion that the evidence does not indicate that these people would all testify that they knew Brady's reputation in the community for truth and veracity was bad, and that they all personally believed Brady to be untruthful. Further, the evidence does not show that any of these people had knowledge of specific instances of conduct by Brady whereby Brady had violated her oath as a court reporter by leaking information obtained in secret proceedings to outsiders.

There is evidence that these witnesses had said in conversations with the private investigator that Brady was not truthful and that Brady's reputation for truthfulness was bad; however, there is no assurance from the fact that they would make statements to a private investigator that they could be expected to testify regarding their statements on

the witness stand. What the private investigator reports is not a basis for any lawyer to stake his professional reputation on by representing that there would be specific testimony on a subject. Much of the testimony was circumstantial and called for a process of deduction. In other words, there were no hard facts on which to base an expectation; far from it, indeed.

In the case of Fitzgerald, according to Phelps Fitzgerald had said to Phelps that she did not want the information regarding the Glenn matter publicized, that she was upset that the information had been leaked, and that she had never heard that Brady could not [be] relied on. Hiett testified that he had been told by Ms. Fitzgerald that she believed Brady had leaked the story, since, in her opinion, Turner would not have done so. But any information that Fitzgerald might have regarding Brady leaking information

to the press was pure deduction on the part of Mr. Phelps. In the case of Brewster, Phelps testified that although he had spoken to Brewster, Brewster had not said whether he would or would not testify as Phelps said he would testify. In the case of Joyce, while Hiett told Phelps that Joyce would testify that Brady was untruthful, and that Joyce knew Brady had a reputation for violating her oath Joyce indicated during a telephone conversation that he had maintained the confidentiality rule, and that he would not discuss Brady's reputation. Mr. Phelps may well have had hopes as to the form that the testimony would take, but hopes are quite different from actual facts and realistic expectations, and there is no indication in Phelps' proffers regarding the testimony of his witnesses that they were based on anything but hopes.

Our conclusion is that Mr. Phelps stated unjustified conclusions in the motion for a new trial. We do not condemn him for listening to the private investigator. But as to this he was not justified in treating the investigator's statements as the gospel without interviewing the witnesses. It is fundamental that a trial lawyer interviews witnesses before relying on the character of the testimony which he expects they will give. Moreover, Mr. Phelps make the mistake of drawing and concluding far too much from limited knowledge as to actual testimony which was reasonably to be expected. This is the essence of his misrepresentations.

We take notice of the fact that it is very seldom that a witness, even though he knows a person tends to be untruthful, will take the witness stand and express his opinion as to the truthfulness of that person; that is, as to whether or not he

or she is a truthful person. Finally, we note that there is virtually no direct evidence that Brady "repeatedly leaked knowledge of such grand jury proceedings to certain of those being investigated by such grand jury".

We must hold, then, from a review of the evidence, that even giving Mr. Phelps the benefit of every doubt, the evidence strongly supports the conclusion that Mr. Phelps had no reasonable grounds for expecting that any of these people were going to testify as to a matter as difficult to testify to as bad reputation for truth and veracity in the community. Further, there is no evidence that any of these people had knowledge that Brady had violated her oath as a court reporter. We must hold, therefore, that Phelps is guilty of ethical impropriety.

The judgment below is generally affirmed (as corrected).

Inasmuch as Misc. No. 80-8008 is consolidated with the above case, it is disposed of on the same basis.

APPENDIX E

UNITED STATES DISRICT COURT
FOR THE TENTH CIRCUIT

JANUARY TERM - February 27, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

IN THE MATTER OF THE DISCIPLINARY PROCEEDINGS OF FRED W. PHELPS, SR., Appellant

J U D G M E N T
No. 81-1022
(Consolidated with
Misc. No. 80-8008)
(D.C. No. 80-1152)

This matter comes on for consideration of the appeal from the judgment of the United States District Court for the District of Kansas wherein a three-judge court suspended Fred W. Phelps, Sr., from practice before that court for a period of two years. This Court considered the record and supplements, the briefs, and argument of counsel.

Upon consideration whereof, the judgment of the United States District Court for the District of Kansas is affirmed.

Inasmuch as the question of the suspension of Fred W. Phelps, Sr., in this Court was consolidated with this appeal, it is order that Fred W. Phelps, Sr., is suspended from practice before this Court for a period of two years, commencing February 27, 1981.

(Signed) Howard K. Phillips,
Clerk

Petitioner's Reply Brief

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1411

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRED W. PHELPS, SR.,

Petitioner,

-vs-

THE KANSAS SUPREME COURT; THE HONORABLE ALFRED G. SCHROEDER; THE HONORABLE ALEX M. FROMME; THE HONORABLE DAVID PRAGER; THE HONORABLE ROBERT H. MILLER; THE HONORABLE RICHARD M. HOLMES; THE HONORABLE KAY McFARLAND; and, THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court; and, THE STATE OF KANSAS,

Respondents.

PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITIONER'S REPLY BRIEF

I. The Kansas Supreme Court Does Not Deny Violating The United States Constitution:

Pursuant to this Court's order of March 9, 1982, respondents have now filed a response brief, which is remarkable for its vehement tone and irrelevant argumentation, but which is even more remarkable for its tacit admission that in disbarring petitioner from the state courts of Kansas, the Supreme Court of Kansas violated the United States Constitution. Nowhere do respondents deny what nine federal judges have now squarely held, that the disbarment order is fatally infected with unconstitutionality, such that neither the federal district court nor the Tenth Circuit Court of Appeals will follow same and disbar petitioner.

Rather than addressing the central and controlling questions presented (see Petition herein, pp. i-iii), respondents

have largely turned aside to rather disjointed and mostly nonlegal arguments tending to blacken petitioner's name and standing. It is as though respondents were saying: "We know that we violated the Constitution, but we are untouchable, and besides, petitioner is a rascal." Such appears unseemly in any litigant, and surely unworthy of a court of last resort, each of whose members swears upon entering office to support and defend the Constitution. This Court is thus presented with a truly sad spectacle, and a most compelling reason to grant certiorari.

Should not an honorable American court, having been clearly shown to be in a grievous fault, long ago have rectified such a grave error, sua sponte, rather than continuing to cavil and quibble over irrelevancies, apparently hoping to escape embarrassment by hiding behind some kind of state court sovereign immunity and

otherwise standing on technicalities? Certiorari should be granted to test whether § 1983 affords relief in these circumstances.

II. The Federal Courts, Remarkably And Unprecedentedly, Refused To Follow The Kansas Court In Disbarring Petitioner:

Because the disbarment order was thus infected with unconstitutional proceedings, both the federal district court in Kansas, and the Tenth Circuit Court of Appeals, each acting independently, refused to disbar petitioner. (See Appendices C and E to respondents' Brief).

Indeed, more than a year after being disbarred in state court, petitioner tried the Irving case in federal court in Kansas, and obtained what is generally conceded to be the highest award for a single black plaintiff by an all-white jury in employment discrimination history in America (more

than $500,000.00, including fee award). In post-trial comment thereon, United States District Judge Patrick F. Kelly, on October 9, 1980, stated:

> "Mr. Phelps is . . . one of the finest trial lawyers and most capable lawyers in the field of civil rights that I have ever known. This case was a masterpiece in the articulation of evidence in this field. I said to someone the night after the final arguments that I only regretted that it was not published and recorded for all to hear. It is a treatise in human rights that should be studied by any lawyer and anyone interested in this field, and to that I commend you, Mr. Phelps. . . . [I]t will serve as a catalyst for other able lawyers to step forward and pursue matters in this area. . . . I think, Mr. Phelps, you have led the way and perhaps others will follow." (Irving v. Dubuque, No. 78-1378, D.Kan., T. 960-961).

On October 22, 1981, a black Topeka attorney Charles S. Scott, Jr., a nationally recognized legend in civil rights litigation*, testifying in federal court in Kansas City, stated:

> "Well, I would like to think that a few years back before Fred Phelps came on the scene that Chester I. Lewis of Wichita and myself were the leading civil rights lawyers in the State of Kansas, but we can't say that any longer because Fred Phelps has joined that rank and far exceeded that which we experienced during that time." (In re Phelps, No. 80-1152, D.Kan., T. 35).

The refusal of the federal courts to disbar petitioner following the state court disbarment is all the more remarkable because it is unprecedented in Kansas, due to the strong principle of comity. The

*E.g., counsel for plaintiff in Brown v. Board of Education, 347 U.S. 483 (1954).

federal court in Kansas recently held in In re Russo, No. 81-1127A:

> "Our judicial systems operate under the fundamental principle of comity. To permit petitioner to practice in this court when he has been denied reinstatement in the state court would create an anomalous situation that would seriously undermine the public's confidence in our respective systems, each of whom have the responsibility to determine the circumstances under which persons may engage in the practice of law." (Order, 1/29/82, unpublished).

Such exceptional circumstances constitutes yet another compelling reason for granting certiorari.

III. Petitioner's High Moral Character, Learning And Skill In The Law, And Renown As The Foremost Civil Rights Lawyer In Kansas, Has Never Been Questioned, Except By The Kansas Supreme Court:

Because respondents have devoted much of their brief to maligning petitioner, this Court should know that petitioner is a 52-year-old white American male who came from Mississippi to Topeka, Kansas, some 28 years ago, to pastor a small primitive Baptist church, and has been there in the same place, with his wife and 13 children, still pastoring that same church, to the present time. He has never been convicted of so much as a moving traffic violation. He went to Washburn Law School to help this country by advancing the cause of civil rights, and it is his joy that most if not all of his 13 children appear to be unselfishly following him in both his religious convictions and in his devotion to civil rights and civil liberties.

The Honorable E. Newton Vickers, chief administrative judge of the state courts in Topeka testified by affidavit and stipulation before the federal court in

Kansas City, on February 20, 1980, as follows:

> "That he is Judge of the Third Division of the District Of Shawnee County, Kansas; that he is currently Senior District Judge and Administrator of this Judicial District; and has been on the bench in Shawnee County, Kansas, for the past twenty-three years. That he is now and has been well acquainted with Fred W. Phelps, Sr. and has been since Mr. Phelps was admitted to the Bar in 1964. That Fred W. Phelps, Sr. has been an active practitioner before the undersigned in a wide variety of civil and criminal litigation. That the undersigned has had repeated opportunities to view the professional competence and skill of Fred W. Phelps, Sr. and is well acquainted with his reputation for honesty, truth and veracity in the community in which he lives. That in the opinion of the undersigned, Fred W. Phelps, Sr. is a competent, able and skillful practitioner of the law in my

> Court and enjoys a good reputation for honesty, truth and veracity. That in the opinion of the undersigned, Fred W. Phelps, Sr. fills a need in the community in representation of the poor and minority classes of people in particular." (In re Phelps, No. 80-1001-A, T. 229-230).

The United States District Court for the District of Kansas, Chief Judge Theis, and Judges Saffels and Stanley, stated on November 30, 1981, regarding this petitioner:

> "The Court has never questioned the abilities, skills and personal moral character of [Mr. Phelps] . . . [He] is a civil rights attorney of well-known repute." (In re Phelps, No. 80-1001-A, D.Kan., unpublished).

Rev. Charles H. Chapman, Sr., a black Baptist minister and NAACP leader in Topeka, testified in federal court as follows:

"Well, I would say Mr. Phelps in the black community -- I would equate him with terms of what we would call a modern day John Brown. I mean, he is just really someone that we can really feel that we have to promote our causes. . . . I would say that in these areas he has promoted a strong feeling that there is somebody to turn to, somebody to represent them in the courts, someone to give them their day in court. . . . I feel that there is a need for this because as I see it, and my contact with other blacks and other minorities in the community, I feel that if Mr. Phelps wasn't available these frustrations would be manifested in other ways and we can all remember that back in the '60's and these sort of things, and I think it really gives them something that there is really a man in the community that has the skills, the competency and that they can really trust to really represent them and not sell them out. And if you allow me to theologize a little bit, I would say that

> the way he is looked at in terms of the black people in the black community, and here is a man, and this is -- and God has a way of breaking through the sovereignty of time and everything, and here is a man that God has placed here to use to represent us with his skills and knowledge to bring our cases, and cases of these natures to the courts of law." (In re Phelps, id., T. 65-66).

Rev. D. D. Miller, black Baptist minister and president of the Wichita branch of the NAACP, testified in federal court as follows:

> "Throughout our community Mr. Phelps is likened unto Abraham Lincoln to our community. He is likened unto President Kennedy, and Dr. Martin Luther King. Others who have taken a very definite and meaningful stand with black, poor and other persons who need their legal assistance. And, of course, I think if he were running for President he would beat out Mr. Carter as well as Mr.

Kennedy in the community that we serve is concerned. He is a very fine person." (In re Phelps, id., T. 94-95).*

*The above quotes are merely illustrative. Persons testifying similarly on behalf of petitioner's character, skill, devotion, and benefit to the bench, the bar, and the public good, include: Honorable Sam A. Crow (United States District Judge); Honorable Adrian J. Allen (state court judge); Honorable Michael A. Barbara (state court judge); Honorable C. Warner Eisenbise (state court judge); Honorable James H. Hope (state court judge); Honorable James E. Wells (state court judge); Robert R. Arnold (president, Wichita Bar Association); Melvin Belli (former president, ATLA); James L. Branton (former president, Texas trial lawyers association); John Burgess (former Vermont judge); Roy R. Bartlett (law professor); Robert E. Cartwright (former president, ATLA); William E. Glenn (assistant city attorney); Allen K. Easley (law professor); Jack Focht (former president, Wichita Bar Association); Ronald C. Griffin (law professor); Richard E. Jones (assistant city attorney); Theodore I. Koskoff (former president, ATLA); J. Richard Lake (county attorney); Jim D. Lovett (former president, Texas trial lawyers association); Sheldon Miller (former president, Michigan trial lawyers association); Vern Miller (former Kansas attorney general); Herbert B. Newberg (distinguished legal author); John F. Townsend, Jr. (former president, Indiana trial lawyers association); Bernal Cantwell (United States Marshal); Harry M. Philo (president, ATLA); R. W. Niederhauser

(attorney); John A. Bausch (attorney); Larry E. Bengtson (attorney); Dale Berning (attorney); Patrick S. Biship (attorney); William R. Brady (attorney); Eric D. Bruce (attorney); Rodney H. Busey (attorney); Gerald J. Domitrovic (attorney); George E. Erickson (attorney); J. H. Eschmann (attorney); Alan M. Gleichenhaus (attorney); Rick Hanson (attorney); Dan E. Turner (city attorney); John E. Howe (former law school dean); Kenneth L. Ingham (attorney); Paul G. Jarvis (attorney); Debra P. Jones (attorney); Stephen M. Joseph (attorney); Don C. Krueger (attorney); Chester I. Lewis (attorney); F. G. Manzanares (attorney); Joel W. Meinecke (attorney); Daniel L. Mitchell (attorney); John Terry Moore (attorney); Robert D. Nelson (attorney); John M. Ostrowski (attorney); Dwight Parscale (attorney); Emerson M. Pomeroy (attorney); Charles I. Prather (attorney); Thomas F. Puckett (attorney); David Michael Rapp (attorney); Leslie C. Ratliff (attorney); Steven John Rupp (attorney); Gary A. Savaiano (attorney); Roger Thompson (attorney); William R. Vincent (attorney); Beau Williams (attorney); Charles D. McAtee (attorney); John Bohannon (attorney); Honorable Theo Cribbs (black State Representative); Honorable Billy Q. McCray (black State Senator); Floyd Atkins, Jr., M.D. (certified cardiologist); W. Filmore Haith, M.D. (certified obstetrics-gynecologist); James S. Johnson, M.D. (certified obstetrics-gynecologist); Marion W. Richardson, M.D. (certified obstetrics-gynecologist); Max F. Wichers (optometrist); Patty J. Annis (college professor); Margaret J. Arnold (college professor); Antonia Dobrec (college professor); Larry J. Halford (college professor); Myra Hinman

Thus, respondents' unwarranted attack on petitioner's name and standing has no evidentiary basis in this record. Clearly, respondents have resorted to such unworthy

(cont.)

(college professor); Karl D. Hockenbarger (clinical professor); Mario A. Ramos (college professor); Albie Rasmussen (college professor); Harry W. Wade (college professor); Dorothy Willner (college professor); Jack Alexander (water commissioner); Burton L. Buser (governor's committee); Bill Crow (President, Shawnee County Taxpayers' Association); Elizabeth Fergeson (Chairperson, Kansas Crime Counsel); Ralph Gomez (courtroom clerk, United States District Court); Alvin Knatt (Director, E.E.O.C.); Dr. Betty L. Lessard (Assistant Principle, Wichita School System); Delois Martin (Committee Woman, Precinct 1, Ward 4); William V. Minner (Kansas Commission on Civil Rights); Milton T. Colbert (assistant pastor); Christopher R. Davis (church clerk); Charles W. Hockenbarger (church treasurer); Milton Jackson, Sr. (assistant bishop; pastor); Billy L. Johnson (minister); Forrest Stanley Judd (pastor); Max L. Manning (pastor); Printis McClain (pastor). Plus some 568 additional persons (judges, lawyers, public officials, professors, ministers, professional and business leaders, etc.) whose integrity and character was stipulated as beyond question, and whose combined testimony, transcribed, fills five large volumes in this record.

tactics to hopefully draw this Court's attention away from the central and controlling questions presented, to wit: the Kansas Supreme Court's violations of the Constitution, and relief therefrom under § 1983. This is another compelling reason why certiorari should be granted.

IV. That A Handful Of Kansas Bar Association Officers Should Be Induced To Come To The Kansas Court's Aid By Filing An Amicus Brief In The Tenth Circuit, Is Remarkable And Unprecedented:

Curiously, respondents somehow arranged to get a few Kansas Bar Association officers to employ certain politically active defense bar friends to file a rather innocuous brief amicus curiae in respondents' support in the Tenth Circuit. This was done apparently after the respondents perceived themselves to be in trouble on the constitutionality of their disbarment order. These men do not even speak for the rank

and file of the Kansas Bar Association membership, let alone the people of Kansas.

But the reportedly feverish activity resulting in the filing of said brief, and the fact of its filing, demonstrates genuine concern by respondents that they had done wrong and a desire not to be embarrassed by said wrongdoing, and demonstrates further the importance of this case and why certiorari should be granted.

To say that the people of Kansas need protection from petitioner's practice of law in state court is pretextual. There is no evidence for such a notion. All the evidence is to the exact contrary. E.g., the Honorable Gary A. Savaiano, chief state judge pro tem in Topeka, testified in federal court on October 23, 1981, as follows:

> "Fred Phelps, while he was practicing in the state courts, now, I am not familiar with what goes on in the federal courts, had a very profound

effect upon the practicing attorneys in Shawnee County, Kansas. I, of course, am not aware of the effect he has on attorneys in other counties because I limit my practice there. While he was there practicing some 15, 16 years that I knew him before he was disbarred or suspended, it is my opinion that he had a positive effect upon the practicing bar in Shawnee County. He kept them alert. He caused them to prepare their cases fully and to come into the courtroom well prepared and ready to present their case fully to the trial judge. And I can speak on behalf of myself when I had cases against him, I made sure that I followed every local rule, every rule of the Supreme, the Kansas Supreme Court, and that I was fully prepared because I knew well and good that he was going to be. And I feel from talking with the other lawyers that they felt the same way. They were also well prepared and did a better job for their clients when Fred Phelps was around because they knew that he was going to be well prepared and coming at them, so to speak. Since he has been removed from the state practice, I

personally believe that things have gotten a little lax in Shawnee County, Kansas, and aren't being strictly adhered to and procedures are very lax, and I just feel on behalf of the practicing bar that things aren't as efficient as they should be, and mainly because nobody is there to really put a big hand, so to speak, on them, or to force them to do so. Second of all, insofar as the business community is concerned, Fred Phelps, while he was practicing certainly had an effect upon them, and I am sure a lot of them were scared of him, or even probably hated him. I can remember the last case I tried against his firm, while it did go to the jury and while we did come out on the right side, the jury ruled in our favor, it did cause my client, who was a business person, to change his entire office procedures and in talking with him since that time I have found that not only as a result of that proceeding his office is now more efficient, both in the way he conducts it internally and he feels he does a better job towards his clients as a result. So while there might be a lot of adverse feeling as to the type of

lawsuits Fred Phelps did bring at the time, he did have a good effect on the business community, also, I feel, because it kept them on their toes, and it caused them to gear their business operations properly and efficiently. . . .

Q. Not only with respect to how they conducted their business but truth in advertising and in that regard, is that what you are referring to?

A. Yes, sir.

Q. Mr. Phelps was an early leader in that kind of consumer litigation in Topeka, was he not?

A. He was the only one, yes, sir.

Q. And since he has gone there hasn't been anyone appear on the scene to take his place for that job, has there?

A. That is true. There is nothing going on right now. (In re Phelps, id., T. 182-185).

Further, Mr. Jerry Eschmann, a leading insurance company, civil defense lawyer, often on the other side of petitioner's litigation and hence peculiarly situated

to know whereof he speaks, testified in federal court on October 23, 1981, as follows:

> "Mr. Phelps is very skillful in the practice of law; probably one of the best trial lawyers in the City of Topeka or the State of Kansas, as far as I am concerned, in handling claimants' cases. . . . Well, you can't try cases without first becoming well acquainted with the counsel on the other side. Mr. Phelps -- I hate to say this, Charlie -- but probably is one of the few lawyers in the City of Topeka that when he tells you he will do something, he will do it. In other words, I think his honesty and integrity is above reproach, based upon the experiences I have had in working with him. Most lawyers might just hedge a little bit, but he doesn't. . . . Well, I have heard what Savaiano said and I would like to echo what he said without being repetitive about that. But I think that Mr. Phelps has had a profound impact on the bar in Kansas, on the practice of law in Kansas, and he has had a

profound impact on the business community. And I agree with Mr. Savaiano, what I heard. In the last year and a half things have changed, at least in the City of Topeka. I think this man has been a tremendous credit to the legal profession. He has taken on cases that most lawyers won't touch. As a matter of fact, I am personally aware of a number of clients that he has represented that were sent to him by courts, by judges, because they knew no other lawyer would touch the case and he has done an excellent job for them. He has taken on unpopular causes. There are not very many lawyers that will do that. And he has done that at a tremendous sacrifice to himself, I believe, because he is one of the finest trial lawyers I know. . . . I may be criticized because I am a defense lawyer and I am on the other side all the time and represent primarily insurance companies. But there is a very definite need for this, and that need is lacking now, at least in the Topeka area, I think." (In re Phelps, id., T. 189-191).

Thus, the record evidence is that the people of Kansas are suffering by petitioner's disbarment. Protection is needed, indeed, but not from this petitioner practicing law. Protection is needed from judicial tyranny that arbitrarily and unconstitutionally removes a civil rights champion from the bar upon a pretext. For this additional compelling reason, certiorari should be granted.

V. Respondents' Appendices A-E, In A Separate Volume, Handily Juxtaposes Five Opinions Herein, Showing Dramatically The Travesty Of This Case:

Respondents' Appendix "A":

This panel report by a three-lawyer hearing panel (the only tribunal who ever heard any evidence on the original charges against plaintiff, that was at a secret closed three-day hearing), concludes:

> "[T]he Panel concludes the violations found

> herein do not justify suspension or disbarment. . . . We therefore recommend Public Censure."

Said panel found that petitioner had no "reasonable basis" for certain proffers made at trial, and translated that simple negligence-test finding into violation of DR 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation), DR 1-102(A)(5) (conduct prejudicial to the administration of justice), DR 7-102(A)(5) (knowingly make false statement of law or fact), and K.S.A. 60-211 (same as Fed.R.Civ.P. 11)

The Ultimate Legal Question: What Is A Proffer?

Never before has the legal term of art, "proffer," been defined as a voucher, a certification by the attorney of the quality of evidence, or a representation that the attorney was giving personal first-hand assurance that the expected

or hoped-for evidence would be exactly as proffered. It has always meant merely the expression of an expectation or hope.

The Ultimate Fact Question: May An Experienced Trial Lawyer Make A Proffer Based Upon Information Supplied By An Experienced And Trustworthy Private Investigator?

Petitioner, an experienced trial lawyer, has been disbarred for making a proffer in reliance upon an experienced, trustworthy, independent, state-licensed private investigator upon whom he had successfully relied numerous times in the past under similar circumstances, and whose abilities, integrity, competence and trustworthiness were stipulated to by the state in this case as being superlatively good and unquestioned. (See petitioner's Appendices 1, 2 and 3 hereto).

Numerous competent trial lawyers have studied this record and have testified herein that petitioner had far more than a reasonable basis for said proffers, and

in their opinion petitioner did nothing wrong. (See petitioner's Appendix 4 hereto).

Professor Monroe Friedman, probably this country's leading authority on legal ethics, told the federal court herein that petitioner did nothing wrong, saying:

> "I feel . . . strongly that this particular case is one that should have never been brought." (See petitioner's Appendix 5 hereto).

The Test Or Standard: "Beyond Peradventure" Or "Reasonable Basis":

Never before has a "reasonable basis" test been applied to said disciplinary rules describing fraud, deceit, and misrepresentation. Every other jurisdiction addressing the subject applies a "beyond peradventure" test. Murchinson v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961); Brown v. Cameron-Brown Co., 652 F.2d 375, 378 (4th Cir. 1981), affirming the rationale of

Judge Warriner, No. 78-0836-A, unpublished (E.D.Va., 6/13/80):

> "This Court does not find that a reasonable attorney, acting in good faith, would have filed and proceeded with this suit in the fashion of counsel for plaintiffs. Yet the Court is unable to say 'beyond peradventure' that the pleadings submitted by plaintiffs' counsel are sham and false and devoid of factual basis. Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961). Accordingly, while expressing no view on the merits of plaintiffs' claim, the Court must deny the defendants' motion to dismiss pursuant to Rule 11.
>
> * * *
>
> The Court also denied the defendants' motion to dismiss under Rule 11; although unconvinced that a reasonable attorney acting in good faith would have proceeded on the information available to plaintiffs' counsel, or in the manner followed by plaintiffs' counsel, the Court could not say 'beyond peradventure' that the pleadings and their amendments are sham and false and fully devoid of

factual basis. Murchison v. Kirby, 27 F.R.D. 14, 19 (S.D.N.Y. 1961)."

The Hearing Panel, Misapprehending The Ultimate Legal Question, Misconceiving The Ultimate Fact Question, And Applying A Mistaken Standard, Fell Into Error:

The hearing panel, in finding misconduct against petitioner, simply said in effect: "Because we three attorneys do not believe we would have relied on Mssrs. Hiett, Niederhauser, etc., petitioner was negligent in relying on those gentlemen, and ergo, petitioner knowingly made false statements and committed fraud and deceit when he made proffers in reliance thereon."

Stated another way, the hearing panel found in effect: "Because we do not believe we would have entertained those expectations, petitioner should not have entertained them, and when petitioner did entertain them and when petitioner did express those expectations or hopes in the form of

proffers, he was negligent in our view, and therefore he committed fraud, deceit and misrepresentation."

It is crystal clear that the hearing panel grievously erred, made a mountain out of a mole hill, and thereby set in motion a chain of tragic sequential events. Little wonder the panel recommended only public censure. They obviously felt the weakness of their untenable position. And Petitioner strongly excepted the recommendation of public censure, before the Kansas Supreme Court. That Court, however, ignored the exceptions and, instead, unlawfully went outside the issues and evidence and, as a result, expanded public censure to disbarment: A CLEAR (NOW JUDICIALLY DETERMINED) CONSTITUTIONAL VIOLATION. Surely, under these circumstances, this Honorable Court's review is both appropriate and essential.

Respondents' Appendix "B," Kansas Supreme Court Opinion:

In The Hands Of The Kansas Supreme Court, The Panel's Mole Hill Becomes A Flaming Vesuvius:

What the Kansas Supreme Court did wrong, in violating plaintiff's due process rights, has been best and most succinctly described by Circuit Judge McKay as follows:

> "When the Kansas Supreme Court reviewed the charges, record and recommendations of the disciplinary committee in this case, it rejected the committee's recommendation of public censure and instead ordered that plaintiff be disbarred. State v. Phelps, 226 Kan. 371, 598 P.2d 180 (1979), cert. denied, 444 U.S. 1045, 100 S.Ct. 732, 62 L.Ed.2d 731 (1980). In doing so the court added a charge not made or briefed prior to that court's opinion.[1]

[1] A panel of the State Board of Law Examiners recommended public censure of the appellant based only on charges other than DR7-102(A)(1). The Kansas Supreme Court sustained the findings of the Board and concluded: "Additionally, we find the entire record before us clearly

In addition to this dissenter, three other judges of this court have in a prior opinion indicated their agreement with this assessment.[2] In the Matter of the Disciplinary Proceedings of Fred W. Phelps, Sr., 637 F.2d 171 (10th Cir. 1981). I do not

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supports a violation of DR7-102(A)(1)." State v. Phelps, 598 P.2d at 187. Without segregating the DR7-102(A)(1) violation from the other charges, the court decided to disbar rather than censure appellant.

[2]After reviewing the same record before the Kansas Supreme Court in connection with a federal court disciplinary proceeding, a unanimous three-judge panel concluded:

> 'The district court correctly held that defendant had been deprived of his rights under the due process clause in accordance with In Re Ruffalo, 390 U.S. 544 [88 S.Ct. 1222, 20 L.Ed.2d 117] (1968), when the state

understand the majority to deny this unavoidable characterization of the proceedings below. In what amounts to a kind of 'harmless error' approach to the matter, the majority has minimized the importance of the uncharged and unbriefed issue in the Kansas Supreme Court decision and disregarded the recommendation of its own bar association disciplinary panel in order to impose the penalty of loss of license and livelihood. In this I respectfully cannot join. In fact it is the uncharged violation which seems to be the focal point of the Kansas Supreme Court decision. That court seemed compelled to rely on the uncharged violation to justify its greatly escalated penalty.

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court found him guilty of violating DR7-102 A 1, the charge in which he had not been given notice.'

In re Phelps, 637 F.2d 171, 174 (10th Cir. 1981)."

Phelps v. Kansas Supreme Court, 662 F.2d at 652-653.

Respondents' Appendix "C," Federal District Court Opinion:

A Three-Judge Federal District Court Panel Squarely Holds The Kansas Supreme Court Violated Petitioner's Due Process Guarantees:

The United States District Court for the District of Kansas stated:

> "The Supreme Court, in holding as it did that the respondent violated DR 7-102(A)(1), violated the respondent's due process guarantees by denying him both notice of the charge and an opportunity to respond to that charge. The mere fact that the ethical infractions charged against respondent occurred in the course of the trial of Robinson v. Brady, whose record was necessarily before the Court to illuminate the misrepresentation issue, would in no way allow the enlargement of charges by the Kansas Supreme Court to include other misconduct shown in such record but not noticed and charged by the Disciplinarian and the Hearing Panel. The Kansas Supreme Court cannot justify any enlargement

> outside the scope of the Ruffalo holding. The Supreme Court's reliance on DR 7-102(A)(1) can serve no basis for action by this court, since as to that charge the first requirement of Selling, embodied in local Rule 4A II D1, is not met." (Respondents' Appendix "C," pp. 13-14.)

Nevertheless, The Federal Court Also Erred By Misconstruing The Nature Of A Proffer, By Placating The Kansas Supreme Court In Adopting Their Novel "Reasonable Basis" Standard, And By Misreading This Court's Ruffalo Opinion:

The Proffer:

The federal district court, while finding much error in what the hearing panel and the Kansas Supreme Court did, nevertheless followed them, in part, into the same errors by saying:

> "This Court, likewise, in applying the clear and convincing evidence before the panel on the misrepresentation issue, believes the panel judges' conclusion to be correct, that respondent Phelps had no reasonable basis for believing some witnesses would testify

> as he stated in the proffers for the very basic reason that Phelps had been told by the witness personally, prior to the times of the proffer, that the witness would not so testify, or that the witness had told no one he would testify as represented." (Respondents' Appendix "C," p. 30).

Just here lies the heart and soul of the courts' errors in this entire case. Every experienced and astute trial lawyer knows that often a potential witness will deny the truth to the lawyer in advance of trial, just to avoid being called as a witness, or for some other reason. If the lawyer, based upon other information, nevertheless believes the witness once placed under oath will in fact tell the truth, his duty is to call him anyway if considered necessary to the client's case. Likewise, even if the lawyer believes the witness will lie under oath, but that his demeanor before the jury will betray the

lie, and thereby equally establish the truth, his duty is to call him. Those are judgment calls for experienced trial counsel to make. A proffer is not a representation that the witness will certainly testify in a certain way, but that counsel hopes or expects to establish certain facts by calling that witness. Those facts are established by what the witness says, what he denies or refuses to say, and his manner or demeanor while thus saying, denying or refusing to speak.

Sometimes A "Hunch" Is Enough To Support A Proffer:

Sometimes trial counsel may have little more than a "hunch" to go on. Indeed, U.S. District Judge Patrick F. Kelly recently praised this petitioner for pursuing nothing more than a "hunch" in presenting witness testimony at trial, saying:

> "I have to believe that Mr. Phelps fully prepared in this case, unlike the defense, perceptive as any trial lawyer I have observed, had a hunch

> he could safely extract from those witnesses just what he did which, in my opinion, was the rudiments of this case." (Irving v. Dubuque, Case No. 78-1278, 10/9/80, T. 922-923).

Indeed, petitioner called hostile witnesses in the Irving trial fully expecting their testimony would be the opposite of what he intended to prove, because he was convinced such would constitute lying to the jury, and the jury could readily perceive same by the demeanor of said persons on the stand. Such tactics are totally consistent with a search for truth in the trial process, and his "hunches" are important assets to a trial lawyer of skill and experience. Obviously, petitioner had considerably more than a "hunch" in the instant case; nevertheless, petitioner has been disbarred for not having a "reasonable basis."

The Erroneous Standard:

The federal court conceded that what they

did to petitioner was unprecedented, saying:

> "A majority of this Court feel that since the offense here, while a grave one, is novel and unique as to judicial precedent. It is likewise one in which the line between negligent and willful conduct is not all clear, and lawyers may not be as aware as they should be of the pernicious nature of conduct such as was involved in this case." (Respondents' Appendix "C," p. 36).

The federal court also apparently conceded that they were adopting for the first time the erroneous "reasonable basis" standard, rather than the "beyond peradventure" standard of every other jurisdiction, to avoid "tension" with the Kansas court, saying:

> "A deviation from the state standard of conduct may create tension between the state and federal judicial system. An adoption of a different standard could carry an implicit criticism of the state standard.
>
> . . .
>
> Principles of comity and federalism alone could lead this Court to accept the state adopted standards.
>
> . . .
>
> The defendant argues that the 'reasonable basis' standard potentially subjects an attorney to discipline for acts of mere negligence.

> The Court sees nothing wrong with imposing discipline for conduct which is negligent." (Respondents' Appendix "C," pp. 25-26).

Thus, by erroneously following two of the state court's prime errors, the federal court apparently sought to placate the state court by suspending petitioner for two years. Petitioner, and the cause of civil rights in Kansas, has been sacrificed on the altar of judicial camaraderie. This is a further compelling reason for granting certiorari.

In re Ruffalo:

In misreading In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the federal district court failed to give petitioner the required benefit of Ruffalo's salubrious doctrine. Thereafter, two separate panels of the Tenth Circuit sharply conflicted with each other in likewise, and incongruously, denying the benefits of

Ruffalo to petitioner, on mutually inconsistent and mutually eliminatory grounds. See and contrast, In re Phelps, 637 F.2d 171, 174 (1981), and Phelps v. Kansas Supreme Court, 662 F.2d 649, 651 (1981). Only Circuit Judge McKay has taken the complex factual and legal issues in solid grasp, and correctly analyzed and applied Ruffalo herein, saying at 662 F.2d at 653:

> "I simply do not understand the majority's attempt to distinguish In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968). The majority describes plaintiff's actions in the Robinson v. Brady case as 'one continued and integrated pattern of misconduct' while characterizing Ruffalo's action as two 'distinct and unrelated incidents of misconduct.' The important point is that in both cases the lawyers did not have notice of or any opportunity to be heard on one of several charges relied upon to justify disbarment. It is not enough, as the majority states, that

> the lawyer have 'full knowledge that his actions . . . [are] the basis for the disciplinary proceedings.' What is required by the Due Process Clause is notice of the charges so that an adequate defense may be prepared. The charge of which notice was lacking -- DR 7-102(A)(1) -- condemns conduct of a different nature than that properly charged under other sections of the Code and under state law. Plaintiff was constitutionally entitled to an opportunity to defend against that charge as well as the charges properly brought against him."

In re Ruffalo, 370 F.2d 447 (6th Cir. 1966) contains an excellent discussion of the background of the Ruffalo litigation. In 1962, Mr. Ruffalo was charged with fourteen "alleged instances" of ethical misconduct. The complaint was filed with the Ohio Board of Bar Commissioners on Grievances. A hearing started December 26, 1962, and lasted on and off until August 16, 1963. That hearing was held before a panel of three lawyers on the

grievance committee. Their final report sustained seven charges and dismissed seven charges. They recommended disbarment. During that proceeding, one charge identified as charge number 13 was added. The Ohio Supreme Court entered an order of indefinite suspension in sustaining findings of misconduct on charge 8 (maintenance of clients) and charge 13 ("use of undercover agent Orlando"). The Ohio Supreme Court also noted that Ruffalo had in 1957 been found guilty of "unprofessional conduct" with respect to solicitation. Again, the Ohio Supreme Court ordered indefinite suspension. Mahoning County Bar Association v. Ruffalo, 176 Ohio St. 263, 199 N.E. 2d 396, 8 ALR 3d 1142 (1964), cert. denied, Ruffalo v. Mahoning County Bar Association, 379 U.S. 931, 85 S.Ct. 328, 13 L.Ed.2d 342 (1964).

Thereafter, the United States District Court for the Northern District of Ohio,

Eastern Division, considered the record and refused to take disciplinary action. However, that court indicated the matter would be reconsidered if the Sixth Circuit Court of Appeals reached a different conclusion. In re Ruffalo, 249 F.Supp. 432 (N.D. Ohio, E. Div. 1965).

In that posture, the action came on before the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit entered an order of disbarment based upon charge number 8 (370 F.2d at 449, 450), charge number 13 (370 F.2d at 450-454), and the prior disciplinary matter. The court stated in its opinion as follows:

> "We have before us, and have reviewed, the entire record developed by the Ohio proceedings, but think it proper to dispose of the matter primarily upon the charges (i.e., number 8 and number 13, as well as the prior disciplinary procedure) on which the Ohio court disciplined Mr. Ruffalo. The facts as to these (again, charge number 8, number 13,

> and the prior disciplinary procedure) are not in dispute. We consider whether we find insupportable the Ohio court's determination that such facts disclosed unprofessional conduct warranting the discipline imposed and whether they warrant similar discipline by us." (370 F.2d at 449). (Emphasis supplied, parenthetical thoughts supplied).

It is clear that the Sixth Circuit in the order of disbarment relied upon charge number 8, charge number 13, and the prior disciplinary proceedings. It is also established: charge number 8 was a legitimate, viable charge without any constitutional infirmities. Charge number 13 is that charge which was added during the initial disciplinary hearing. As the Sixth Circuit noted:

> "Charge number 13, the employment of Orlando, was added as a specification of misconduct during the course of the Board of Commissioner's hearing. Mr. Ruffalo objected to this being done, and the Board advised

> him that he could have time to offer proofs in opposition to the charge. The charge was based upon testimony of Ruffalo and Orlando already in the record. No request was made for further time, and no additional proofs were offered by Ruffalo on the point. We find no procedural impropriety in this regard." (370 F.2d at 453-454).

This Court granted certiorari and squarely held that charge number 13, in the way it was presented and resolved, constituted denial of due process. Based thereon, this Court reversed and vacated the Sixth Circuit's order of disbarment. This was done even though charge number 8 did not present constitutional problems, and the findings made on charge number 8 were not made following a constitutionally defective procedure. Also the finding with respect to prior disciplinary problems did not present a constitutional defect. Nevertheless, this Court reversed and

vacated the entire proceeding. Without question, the Sixth Circuit relied upon "the entire record developed by the Ohio proceedings," and relied specifically on charge number 8, charge number 13, and the prior disciplinary procedure, but notwithstanding, this Court held the entire record-basis for discipline must fall.

Thus the Ruffalo situation is virtually identical to the case at bar, is essentially indistinguishable, and this fact is a further compelling reason to grant certiorari.

Respondents' Appendix "D," Tenth Circuit Opinion:

The truly astounding thing about the Tenth Circuit's opinion is that the court further exalted the notion of a "proffer" to some kind of high and holy thing requiring "assurance" that the witness will actually testify, above and beyond the fact that the prospective witness has plainly stated a thing to be true. The remarkable language

by the court is found at pp. 32-33 of Respondents' Appendix "D" herein:

> "There is evidence that these witnesses had said in conversations with the private investigator that Brady was not truthful and that Brady's reputation for truthfulness was bad; however, there is no assurance from the fact that they would make statements to a private investigator that they could be expected to testify regarding their statements on the witness stand. What the private investigator reports is not a basis for any lawyer to stake his professional reputation on by representing that there would be specific testimony on a subject. Much of the testimony was circumstantial and called for a process of deduction. In other words, there were no hard facts on which to base an expectation; far from it, indeed."

Thus, the Tenth Circuit concedes that petitioner had a reasonable basis to believe the witnesses had knowledge of the facts encompassed within the proffers, but no "assurance" that they would actually

testify thereto when on the stand and under oath.

The Tenth Circuit also concedes that "Mr. Phelps may well have had hopes as to the form that the testimony would take" (respondents' Appendix "D," p. 34). But hopes and expectations are synonymous, and if petitioner concededly had such hopes or expectations, there can be no finding of misrepresentation, as a matter of law, when petitioner expresses those hopes or expectations in the form of a proffer.

Truly, by this may be further seen that the entire case against plaintiff is a construction of tissue paper and cardboard, and tiny to the point of invisibility. This is a further compelling reason why certiorari should be granted.

VI. Respondents Err When They Suggest (Perhaps With Tongue-In-Cheek) That Petitioner Has An Adequate State Remedy Available To Him:

Never was the axiom that the law does not require the doing of a vain thing more applicable than to respondents' suggestion that petitioner may apply for reinstatement under Kansas Supreme Court Rule 219, 224 Kan. lxxxix. In one fiery breath respondents tell this Court, in essence, that they are proud and untouchable in violating the Constitution in ridding Kansas of this rascal petitioner, because the state courts and public need protection from the likes of him. In the next breath they say that petitioner may apply for reinstatement, subjecting himself to their unfettered discretionary mercies, and that such constitutes an adequate state remedy defeating recourse to this Court. And reapply, ad inf.

In addition, in Phelps v. Kansas Supreme Court, 662 F.2d 649, 654, n. 5

(1981) it is concluded:

> "Additionally, we are not faced with the problems raised by Younger v. Harrison, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), since appellant has exhausted his state appellate remedies and the state proceedings are now concluded. See Huffman v. Pursue, Ltd., 420 U.S. 592, 607-10, 95 S.Ct. 1200, 1209-1211, 43 L.Ed.2d 482 (1975); Gibson v. New Jersey Supreme Court, 558 F.2d 701, 704 (3rd Cir. 1977). See also American Civil Liberties v. Bozart, 539 F.2d 340 (4th Cir.), cert. denied, 429 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). We do not think that Younger required appellant to file a petition for rehearing with the Kansas Supreme Court, see Kan.Stat. § 60-2701a, Rule No. 7.06 (1976). The disciplinary proceedings are final and are no longer 'pending' against petitioner so as to invoke Younger's noninterference rationale."

To be sure respondents could, and should, sua sponte, grant the relief sought herein, or at least obviate the need for this litigation. It is their very contumacy, in the face of the state court's

obvious violation of the United States Constitution, which provides the most compelling reason for granting certiorari herein.

VII. Respondents Err When They Suggest That This Court Lacks Subject Matter Jurisdiction To Entertain This Case Under § 1983:

To decide that very question presents another demonstrated reason for granting certiorari herein, because this Court has never addressed that precise question. The matter is succinctly put at 662 F.2d 654-655:

> "The only remaining question is whether an attorney disbarred in a state court proceeding may bring in federal district court a 'suit in equity' under 42 U.S.C. § 1983 to enjoin an Order of Disbarment when that order was, in part, based on proceedings which violate the due process clause of the Fourteenth Amendment.
>
> . . .

> Unfortunately, no Supreme Court decision directly deals with an original § 1983 proceeding where a violation of the type reviewed in Konigsberg and Schware is alleged.
>
> . . .
>
> Absent a clear holding that § 1983 was not designed to redress a denial of due process by a state supreme court's application of its statutes, ordinances, regulations, customs, or usages, we are not at liberty to disregard the congressionally created cause of action."

VIII. To Rectify A Strong Appearance Of Impropriety, In The Eyes Of The Highly Respected Community Of Black Americans, Certiorari Should Be Granted:

Numerous eminently qualified black lawyers, medical doctors, professors, religious and civic leaders, and elected representatives, have given competent testimony in federal court herein, to the effect that they and the black community perceive what has been done to petitioner, to be wrongful retaliation against petitioner

because of his highly active and successful civil rights prowess on behalf of blacks and other minorities. For example, Charles S. Scott, Sr., a leading black attorney who has practiced law for 33 years in Kansas, and who is hearing examiner for the Kansas Commissioner on Civil Rights, testified as follows:

> "Q. Mr. Scott, do you believe as a black attorney that Mr. Phelps has been penalized or suspended from the practice of law for two years by this court as a result of his representation of clients for civil rights matters?
>
> A. Perhaps the best way I can answer that, as far as the court is concerned, there has been in this court and also the courts of the State of Kansas, that is, the Supreme Court, it wouldn't appear such. But the underlying factor, I think, certainly would be the motivating factor, I should say, is the reason that he was penalized in the disbarment and also the suspension." (In re Phelps, id., 10/22/81, T. 37).

John Burgess, a noted former judge and legal educator, testified as follows:

> "It is the experience of every lawyer with a wide acquaintance in the field of litigation and particularly civil rights litigation that the civil rights plaintiff is the least favored litigant by the plaintiff's bar, and it is the shame of the plaintiff's bar that that's true, but it is. Consequently, we need men who are willing to handle the cases that, frankly, very few others take, and Fred is a great example of a man who does this and does it admirably with skill and integrity.
>
> . . .
>
> I served for one year as co-chairman of the Rosco Pound Foundation, Commission on Legal Ethics, I presently serve in the capacity of chairman; and that has been a two-year study, with staff support and various commission members participating, in which we took a fundamental look at the way that professional discipline is administered and the standards upon which discipline is invoked across the United States and produced a draft code called the American Lawyers Code of Conduct. And it

became clear to us in that study and I am absolutely convinced from the result of the two years' work in that field that a court sitting in professional disciplinary matters has a two-fold obligation. First, it of course must protect the public and the court from charlatans and frauds and cheats and the incompetent. In addition to that, however, there is co-existant obligation to see to it that the organized bar does not use the disciplinary system to stifle, muzzle, and destroy the lawyers who speak unpopular doctrine and represent unpopular causes. I think it's extremely important that a court . . . will look carefully at the degree, if any, that the particular lawyer is involved in discipline, not because of his conduct in a particular faction setting but because of an overall feeling that he speaks doctrine that is contrary to the prevailing view and he represents those who speak and assert minority points of view. And in all candor, I have to tell the Court that based on a fairly thorough study of this record and conversations with members of the profession in Kansas who opposed Mr.

> Phelps and supported his discipline, I came to the personal and private conclusion that . . . a great deal of the zeal and a great deal of the energies and efforts to bring about first his disbarment and then his suspension was not engendered by the particular conduct but, rather, engendered by an overall feeling that 'we have to be careful that we don't have too many people with minority points of view adequately represented,' and 'we have to be careful that we as lawyers don't allow advance thinking to be presented effectively and in a well thought-out and articulate way in the courts.' I think a judge in court sitting to review Fred's conduct has to bear in mind the ongoing zeal of the majority to stifle the minority, seriously question whether that is not what is being done here, whether the court in continuing his suspension may not in fact be aiding and abetting that pernicious practice." (In re Phelps, id., 10/22/81, T. 20-22).

Because American courts must be as concerned with the appearance of impropriety

as with actual injustice, certiorari should be granted.

Conclusion:

The Kansas court, apparently from extrajudicial considerations, has created new and dangerous law and applied it retroactively and selectively to disbar petitioner in bold violation of the Constitution of the United States. The lower federal courts, while courageously denouncing said unlawful conduct by the Kansas court, have nevertheless followed some of the state court's errors by suspending petitioner, thereby to placate the Kansas court by taking the edge from said denunciation. United States District Judge Sam A. Crow, recently elevated to the federal bench by President Reagan after many years as full-time United States Magistrate in Topeka, testified in federal

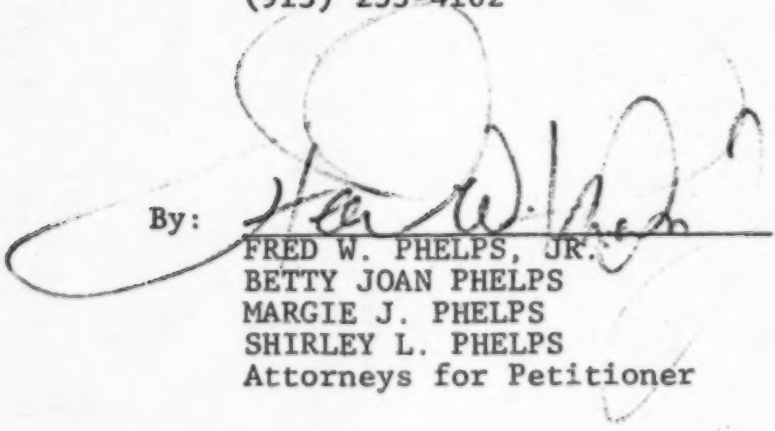
court on petitioner's behalf. Judge Crow testified that he had known petitioner some 20 years, that petitioner's reputation for truthfulness, veracity and legal competency was beyond question in his court, and that no one was more active in representing minorities and in civil rights litigation than petitioner. (In re Phelps, id., 2/20/80, T. 22-24). United States District Judge Richard D. Rogers, Topeka, has often stated that petitioner is the most active civil rights lawyer in Kansas. E.g., in Fisher v. Anderson, et al., No. 78-4305, writing of petitioner:

> "Plaintiff's counsel reminds us we have commented upon his extremely busy schedule in prior orders of this court; indeed, it would not be amiss to state that plaintiff's counsel and his firm are far more busy in this court than any other attorney practicing before us." (Order Awarding Plaintiff's Counsel Fees, 5/4/79, unpublished).

For the stated reasons, and because a great injustice will otherwise remain unrequited, certiorari should be granted.

Respectfully submitted,

PHELPS - CHARTERED
1414 South Topeka Boulevard
Post Office Box 1886
Topeka, Kansas 66601
(913) 233-4162

By: 

FRED W. PHELPS, JR.
BETTY JOAN PHELPS
MARGIE J. PHELPS
SHIRLEY L. PHELPS
Attorneys for Petitioner

PROOF OF SERVICE

The undersigned, Fred W. Phelps, Jr., of PHELPS - CHARTERED, a member of the Bar of this Court and counsel of record for petitioner herein, hereby certifies that on the 10th day of April, 1982, he caused to be served the foregoing "Petitioner's Reply Brief," together with "Appendices 1 - 5 to Petitioner's Reply Brief in Further Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit," by mailing five (5) copies thereof by regular mail to:

Mr. Bruce E. Miller
Deputy Attorney General of Kansas
Office of the Attorney General
Kansas Judicial Center - 2nd Floor
Topeka, Kansas 66612

PHELPS - CHARTERED

By: _____
FRED W. PHELPS, JR.
Attorneys for Petitioner

Appendix

2

Supreme Court, U.S.
FILED
APR 14 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81-1411

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

FRED W. PHELPS, SR.,

Petitioner,

-vs-

THE KANSAS SUPREME COURT; THE HONORABLE ALFRED G. SCHROEDER; THE HONORABLE ALEX M. FROMME; THE HONORABLE DAVID PRAGER; THE HONORABLE ROBERT H. MILLER; THE HONORABLE RICHARD M. HOLMES; THE HONORABLE KAY McFARLAND; and, THE HONORABLE HAROLD S. HERD, Each in His/Her Capacity as Justice of the Kansas Supreme Court; THE HONORABLE ARNO WINDSCHEFFEL, in His Capacity as Disciplinary Administrator of the Kansas Supreme Court; and, THE STATE OF KANSAS,

Respondents.

APPENDICES 1 - 5 TO PETITIONER'S REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Fred W. Phelps, Jr., Esq.
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ATTORNEYS FOR PETITIONER

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PETITIONER'S APPENDICES

APPENDIX 1:

Copy of Affidavit of Ralph J. Hiett, Fred W. Phelps, Sr., Respondent, Arno Windscheffel, Complainant, No. W-995, Before the State Board of Law Examiners, dated March 9, 1978.

APPENDIX 2:

Copy of Affidavit of R.W. Niederhauser, Arno Windscheffel, Complainant, Fred W. Phelps, Respondent, No. W-995, Before the Board of Law Examiners, dated March 11, 1978.

APPENDIX 3:

Copy of Affidavit of Fred W. Phelps, Arno Windscheffel (Complainant), Fred W. Phelps (Respondent), Case No. W-995, Before the State Board of Law Examiners, dated March 9, 1978.

APPENDIX 4:

Petitioner's Anthology of Fact and Law.

APPENDIX 5:

Transcript of Argument Presented by Monroe H. Friedman in In the Matter of: Disciplinary Proceedings of Fred W. Phelps, Sr., Case No. 80-1152, in the United States District Court for the District of Kansas, dated February 21, 1980.

APPENDIX 1

BEFORE THE STATE BOARD OF LAW EXAMINERS

FRED W. PHELPS, SR. - Respondent	)	
	)	No. W-995
ARNO WINDSCHEFFEL - Complainant	)	

A F F I D A V I T

STATE OF KANSAS)
) ss
COUNTY OF SHAWNEE)

The undersigned, Ralph J. Hiett, of lawful age, and being first duly sworn upon his oath, deposes and says:

1. That he is a duly licensed private investigator in the State of Kansas (see copy of license attached hereto) living and residing in Topeka, Kansas. He

has been a resident of Topeka continuously for the past twenty years. Among other positions he has served as Deputy Marshal of the Court of Topeka, Deputy Sheriff of Shawnee County, Kansas and Supervisor of the Port of Entry Division of the Kansas Corporation Commission.

2. That prior to trial of the case of Robinson v. Brady, case number 125,742, in the District Court of Shawnee County, Kansas, in December of 1976, this Affiant made a thorough investigation of certain matters relative to the Defendant Carolene E. Brady.

3. Said investigation extended over a period of many months, and involved personal interviews with many people.

4. In addition, this Affiant has had personal acquaintanceship with and substantial knowledge of Carolene E. Brady and her activities in Topeka, Kansas for several years prior to December, 1976.

5. Moreover, this Affiant worked closely with law enforcement officers in Topeka, Kansas, and with the Shawnee County Taxpayers Association and had a substantial part in the grand jury proceedings in Shawnee County, Kansas involving among others Pete Peterson and Mr. and Mrs. Gary Guerrero.

6. Further, this Affiant has been personally represented by Mr. B. L. Pringle during the course of the past several years and for several years prior to December, 1976, and enjoyed a close personal relationship with Mr. B. L. Pringle during that time.

7. Moreover, for several years prior to December, 1976, and continuing to the present time, this Affiant has enjoyed a close working relationship with numerous attorneys in Topeka and in Kansas and with numerous law enforcement officers at all levels in Topeka and throughout Kansas.

8. Moreover, this Affiant was employed as a private investigator by Mr. William E. Glenn with regard to proceedings against Mr. Glenn initiated by Mr. Dan Turner and involving leaks and publicity relative to a statement given to Mr. Turner in confidence by Karen Kennedy and Kathleen Fitzgerald wherein Carolene Brady was the court reporter and wherein Richard E. Brewster and Rodney Joyce were reporters and claimed a "scoop" with regard to obtaining such confidential sworn statements for publicity over Channel 27, KTSB TV in Topeka, Kansas.

9. Moreover, this Affiant has enjoyed a close association and business relationship with Mr. F. G. Manzanares who, prior to December, 1976, and to the present time, was attorney for Mr. Patrick Brady in a bitter domestic dispute and custody fight with Mr. Brady's former wife, Carolene E. Brady.

10. In the course of his investigation of the Robinson v. Brady matter, Affiant has spoken to F. G. Manzanares, R. W. Niederhauser, Richard Waters, Jess Danner, and other.

11. During the course of his said investigation and prior thereto, this Affiant spoke to numerous persons heavily involved in the second grand jury proceeding called by Attorney General Vern Miller and prosecuted by Mr. Pat Connolly and Mr. Vern Miller, and those persons to whom Affiant spoke include the above-named and other members of the Attorney General's investigatory staff, office personnel, attorneys, and other law enforcement personnel.

12. That based upon his personal knowledge and association with Carolene Brady in Topeka, Kansas, upon information supplied to him by others deemed reliable by this Affiant, upon interviews with numerous persons, and generally upon the

thorough investigation which this Affiant made of these matters as outlined above Affiant reported to Fred W. Phelps prior to, during and after the Robinson v. Brady trial in December of 1976 as follows:

(a) That in his opinion and based upon the above factors numerous people would testify that in their opinion the reputation of Carolene E. Brady for truthfulness and veracity was bad, and that included among those people who would so testify were: Ralph J. Hiett, B. L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy, and others. Further, that such individuals would testify that, in their opinion, Carolene Brady had violated her oath as a certified court reporter;

(b) That in his opinion those individuals (listed in paragraph 12[a]

immediately above, and others) had knowledge and would testify as to specific instances of Carolene E. Brady's misconduct including but not limited to the leaking to the news media of the Bill Glenn case transcripts of Karen Kennedy and Kathy Fitzgerald; and as to the leaking of information by Carolene E. Brady from the two grand jury proceedings previously mentioned.

(c) That in his opinion several lawyers and court reporters, including F. G. Manzanares, Richard W. Niederhauser, Jess Danner, and Richard Waters, would testify that the conduct of Carolene E. Brady relative to the Robinson transcript was reckless.

Further affiant saith not.

/s/ Ralph J. Hiett
Ralph J. Hiett

Subscribed and sworn to before me this

9th day of March, 1978.

/s/ Betty Joan Phelps

[Seal] Notary Public

My Commission expires: June 5, 1978

APPENDIX 2

BEFORE THE BOARD OF LAW EXAMINERS

Arno Windscheffel	)	
	)	
Complainant	)	
	)	
vs.	)	Case No.
	)	W-995
Fred W. Phelps	)	
	)	
Respondent	)	

A F F I D A V I T

STATE OF KANSAS, COUNTY OF SHAWNEE, SS:

The undersigned, R. W. Niederhauser, of lawful age, and being first duly sworn upon his oath, deposes and says:

1. That sometime between the last days of December, 1976 and January 4, 1977, he was in the law offices of Fred W. Phelps at 3701 West Twelfth Street, Topeka, Kansas, and in the company of Fred W. Phelps and Ralph J. Hiett for the purpose of reviewing

plaintiff's motion for new trial and discussing the efficacy of seeking a new trial and appeal if a new trial was denied in the case of Robinson v. Brady, Case No. 125,742 in the District Court of Shawnee County, Kansas.

2. That during that dicussion with Fred W. Phelps and Ralph J. Hiett, affiant was handed a copy of the proposed motion for new trial, was asked by Fred W. Phelps to read the same and offer comments and suggestions concerning the same; that affiant read the motion and upon having read it asked Mr. Hiett in the presence of Fred W. Phelps if he (Hiett) was satisfied from what he knew that if B. L. Pringle, Patrick Connolly, Dan Turner, Dick Brewster, Rodney Joyce, Patrick Brady, Kathy Fitzgerald and Karen Kennedy were called as witnesses they would testify that they had relevant knowledge concerning Carolene Brady; that they knew her

reputation in the community for truth and veracity; and that her reputation for truth and veracity was bad.

3. That Mr. Hiett stated to this affiant in the presence of Fred W. Phelps that there was no doubt in his mind that if the above persons were called as witnesses and if they told the truth that there [sic] testimony would be that they had relevant knowledge of Carolene Brady; that they knew her reputation in the community for truth and veracity; and that her reputation in that respect was bad.

4. That this affiant recalls that at the same conference it was remembered by this affiant that during the trial of the case of Robinson v. Brady this affiant's testimony concerning two telephone calls he made on July 15, 1974, and August 1, 1974, to Carolene Brady's office were answered by women identifying themselves as speaking for Carolene Brady was not

in the proposed motion for new trial and that the same was belatedly included therein by the insertion appearing in paragraph 1(a) thereof.

5. That although affiant is unable to recall the exact words exchanged between Fred W. Phelps, Ralph J. Hiett and himself he does recall Ralph J. Hiett telling both this affiant and Fred W. Phelps that the above named potential witnesses would testify as claimed in the motion for new trial.

6. Further affiant saith not.

/s/ R. W. Niederhauser
Richard W. Niederhauser

Subscribed and sworn to before me this 11th day of March, 1978.

[Seal]

/s/ Shirley L. Phelps
Notary Public

My Commission expires: 12-24-79

APPENDIX 3

BEFORE THE STATE BOARD OF LAW EXAMINERS

Arno Windscheffel (Complainant)

Fred W. Phelps (Respondent)

Case No. W-995

A F F I D A V I T

STATE OF KANSAS, COUNTY OF SHAWNEE, SS:

The undersigned, Fred W. Phelps, of lawful age, and being first duly sworn upon his oath, deposes and says:

1. That he is a duly licensed and practicing attorney in Topeka, Shawnee County, Kansas, having been admitted to the Kansas Bar on or about February 12, 1964. That he is and for approximately 24 years immediately last past has been pastor of Westboro Baptist Church, Topeka, Kansas. That he is the Respondent in the case of Windscheffel v. Phelps, Complaint

Number W-995, before the Board of Law Examiners of the State of Kansas.

2. That he represented the plaintiff Sherman Frederick Robinson in the case of Robinson v. Brady, case number 125,742, in the District Court of Shawnee County, Kansas, which came to trial in December, 1976.

3. That with regard to the proffers which were made by this Affiant during the course of said trial and with regard to the statements and pleadings relative to said proffers all of which being the subject of this proceeding against him herein, this Affiant relied upon the information supplied to him by Ralph J. Hiett.

4. This Affiant refers to the Affidavit of Ralph J. Hiett filed herewith and by such reference incorporates same in this Affidavit as though fully set forth herein verbatim.

5. That this Affiant had abundant

reason to believe and rely on Ralph J. Hiett, because this Affiant has known Mr. Hiett since approximately 1960, has the pleasure of knowing Mr. Hiett's mother and father, Mr. and Mrs. Ralph Hiett, Sr. who are substantial citizens and leaders in the community of Crawford County, Kansas where they have lived and labored for more than seventy (70) years, knows and has known Mr. Hiett's reputation for integrity, truthfulness, and veracity in the Topeka and Kansas community, including the social community, political community, religious community, business community, and the legal and governmental community, and that such reputation is excellent. This Affiant has known Mr. Hiett as a member of the first Docking administration in Kansas, head of the Port of Entry Authority of Kansas, Deputy Marshal of the Court of Topeka, Deputy Sheriff, respected law enforcement officer, friend and confidant

of important and highly respected community leaders in Topeka and Kansas, Precinct Committeeman and President of the Shawnee County Young Democrats, Democratic Candidate for Lieutenant Governor, active member of the Masonic Lodge and Arab Shrine, and a member of the Christian Church in Topeka.

6. Therefore, when Mr. Hiett gave this Affiant such information as is contained and referred to in the Hiett Affidavit filed herewith, this Affiant had a reasonable basis to believe that such information was true, and in fact did believe such information to be true.

7. Further Affiant saith not.

/s/ Fred W. Phelps
FRED W. PHELPS

Subscribed and sworn to before me this 9th day of March, 1978.

[Seal] /s/ Betty Joan Phelps
NOTARY PUBLIC

My Commission Expires: June 5, 1978

APPENDIX 4

PETITIONER'S ANTHOLOGY OF FACT AND LAW

1. A formal complaint was filed by the Kansas Disciplinary Administrator against petitioner before the State Board of Law Examiners on the 8th day of December, 1977, essentially alleging that petitioner had violated DR7-102(A)(5) in that he did knowingly make false statements of fact relative to certain proffers when he represented the plaintiff in a civil action in the District Court of Shawnee County, Kansas, entitled Robinson v. Brady, No. 125,742, which was tried in December, 1976. (Record of State v. Phelps, No. 50,834, Vol. I, pp. 6-31).

2. Pursuant to Kansas Supreme Court Rule 211, a hearing panel was appointed for hearing on said complaint.

(Record, Vol. VII-XII).

3. Two separate prehearing conferences were conducted by said hearing panel pursuant to (old) Rule 217 (213 Kan. lxxxv), the first being held on the 9th day of February, 1978, and the second being held on the 2nd day of March, 1978. (Record of State v. Phelps, Panel proceedings, No. W-995, Vol. 11, pp. 71, 74 & 88).

4. The purpose of said prehearing conference as defined by said rule is as follows: "for the purpose of obtaining admissions or otherwise narrowing the issues presented by the pleadings." Pursuant thereto, the issue was limited to a single issue, and the hearing panel strictly limited the scope of evidence to that issue, being essentially: Did petitioner knowingly make false statements of fact when he made said proffers, and thereby violate DR7-102(A)(5); and the

hearing panel further defined that issue as being "did somebody tell Fred Phelps that such and such a person would testify to such and such a way". (Transcript of March 2, 1978 hearing, p. 19).

5. The hearing panel thereafter specifically ruled that no evidence would be allowed as to whether petitioner's informants had a reasonable basis for their information or not. "I don't care whether that person had any basis for what he told Fred Phelps. I am not going into that, as to whether it was true or false, but at this particular time, did he have reason to believe that Dan Turner would testify in this manner if called, and so on down the line." (Transcript of March 2, 1978 hearing, pp. 19-20).

6. The hearing panel specifically forbade petitioner to offer evidence as to the truthfulness of said proffers, as to the reasonableness of his informants'

basis, or as to the reasonableness of his reliance on his informants. (Transcript of Panel Hearing of March 13, 14 and 15 - Pages 64, 65, 67, 73-75, 78, 93-101, 116, 139, 141, 143-45, 176-78, 185, 192-94, 210-15, 217-19, 238-42, 260, 261, 265-66, 306-310, 400-03, 406, 407, 409, 410, 412-15, 473, 474, 497-99, 517, 523, 524, 536 and 537).

7. Although petitioner was technically charged with a violation of DR7-102 (A)(5) (knowingly making a false statement of law or fact), the conduct of the panel at the prehearing conferences and thereafter defining the single issue to be tried, constituted failure of fair notice and opportunity to be heard on the single issue charged. (Transcript of March 2, 1978 hearing, pp. 4-6 & 18-20).

8. That petitioner was denied notice and opportunity to be heard on the single issue charged may be seen by

the inconsistencies and vacillations of the hearing panel's rulings, as reflected in the record, as follows:

> (a) At the final pre-trial, petitioner was plainly and strictly advised, cautioned, and even warned by the panel that the panel did not care about petitioner's informants' basis for the information supplied to petitioner relative to said witnesses included in said proffers. Petitioner was given to understand plainly that no such evidence would be permitted, that the truth of the proffers was irrelevant, and that the basis that the informants had for advising petitioner was irrelevant and no evidence would be permitted thereon. Panel Chairman: "I don't care whether that person had any basis for what he told Fred Phelps. I am not going into that . . . ." (Transcript of March 2, 1978 Pretrial Hearing, page 19).
>
> (b) As the trial progressed, the hearing panel in the midst thereof did a complete about-face and announced that

the informants' basis would be important in the ultimate resolution, and that may be found expressly in the colloquy between two members of the Panel as follows: Mr. Kessler: "We need to know whether Mr. Hiett had a reasonable basis to make the statement to Mr. Phelps." Chairman Hornbaker: "I think that will become important in the ultimate resolution of the matter . . .." (Transcript of Panel Hearing of March 13, 14 and 14 - page 100).

(c) Nevertheless, even after reversing itself in the midst of the hearing, the panel consistently excluded evidence offered and attempted to be offered by petitioner tending to support the adequate basis of the petitioner's said informants. (Transcript of Panel Hearing of March 13, 14, and 15 - pages 64, 65, 67, 73-75, 78, 93-101, 116, 139, 141, 143-145, 176-78, 185, 192-94, 210-15, 217-19, 238-42, 260, 261, 265-66, 3-6-10, 328-330, 334, 361-64, 387, 388, 391, 395, 400-403, 406, 407, 409, 410, 412-15, 473, 474, 487-99, 517, 523, 524, 536 and 537) (Item 3 of the 5-Point Trap Chart).

(d) Furthermore, although consistently refusing petitioner's attempts to produce evidence tending to support the adequacy of the informants' basis, the panel itself repeatedly solicited evidence tending to show that this petitioner's said informants did not have an adequate basis for the information supplied to this petitioner relative to said witnesses and said proffers. (Transcript of Panel Hearing of March 13, 14, and 15 - pages 102, 103, 154-161, 318-322, 377-379, 409, 410, 448-457, 599-605, and 609) (Item 4 of the 5-Point Trap Chart).

(e) Thereupon, almost one year after the panel hearing, the panel handed down its report finding misconduct solely because the appellant had no reasonable grounds to believe his informants because those informants did not have an adequate basis for the information they provided petitioner. This is repeatedly said in several different ways in the panel report. (Panel Report, pp. 5, 8, 9, 10, 11 and 12).

9. Petitioner was further denied notice and opportunity to be heard on the single issue charged by virtue of what the hearing panel did with respect to the petitioner's private investigator Ralph J. Hiett. As reflected by the panel report, the hearing panel found that petitioner had no right to rely on the private investigator Hiett, and that petitioner in fact had a duty to investigate his said investigator. (Record, Vol. I, p. 40; Panel Report, p. 9). Nevertheless, the hearing panel expressly prohibited evidence offered by petitioner which would have established the reliability of Mr. Hiett. In sustaining the State's objections to all such evidence, the panel expressly provided as follows: "I think it's irrelevant and immaterial. As far as I am concerned, Mr. Hiett is honest, dependable, loyal, trustful, a good United States citizen at this time.

Why go into it?" (Mr. Wilbert at p. 141 of the Transcript of the Panel Hearing of March 13, 14 and 15, 1978). Whereupon Chairman Hornbaker concurred as follows: "That's exactly my thinking, except he [Mr. Wilbert] stated it a little more concisely than I would". (Transcript of Panel Hearing, at p. 141).

10. The hearing panel apparently failed to see or articulate the ethical issue, and while attempting to charge an ethical violation in the language of a deliberate intentional tort (knowingly make a false statement of fact), the panel vacillated on that issue and wound up almost a year after said hearing by filing a panel report finding that petitioner's misconduct was essentially nothing more than negligence. (Record, Vol. I, pp. 36, 39-43; Panel Report, pp. 5, 8 & 9-12).

11. The hearing panel in effect concluded that a reasonable and prudent attorney in petitioner's situation would not have relied on the sources of information which petitioner relied upon, to wit: A simple negligence test at best. The panel then hurdled a vast chasm to reach the ultimate conclusion: That petitioner knowingly made a false statement of fact when he expressed his expectations of the substance of evidence, when those expectations were based upon petitioner's informants' information. (Record, Vol. I, pp. 36, 39-43; Panel Report, pp. 5, 8 & 9-12).

12. Notwithstanding the strictly limited single issue defined for trial, and further notwithstanding the extremely limited evidence which was allowed and adduced before the hearing panel, the Kansas Supreme Court not only affirmed the erroneous conduct and findings of

the hearing panel, but for the first time in the proceedings added an additional charge of violating DR7-102(A)(1); and without any relevant evidence whatever, without notice to petitioner or opportunity for petitioner to be heard on that charge, the Kansas Supreme Court found petitioner guilty of violating DR7-102(A)(1) and much of the opinion is given over to colorful language relative to said charge including that petitioner was guilty of badgering a witness, conducting a vendetta, conducting an onslaught, etc., etc.; and based thereon, the Kansas Supreme Court enhanced the punishment from public censure to disbarment of this petitioner. (220 Kan. 371, at 379 & 380).

13. Kansas Supreme Court Rule 212(e)(5) (224 Kan. Ixxxvii) provides that petitioner was entitled to a hearing on the merits before the Kansas Supreme Court subsequent to the panel hearing which the

Kansas Supreme Court described as merely a type of discovery. (State v. Phelps, 226 Kan. 371, at 380). Nevertheless, petitioner was not allowed a hearing on the merits before the Kansas Supreme Court. Petitioner was merely allowed thirty minutes for oral argument before the Kansas Supreme Court. Thus, as the disciplinary rules were applied to this petitioner, he never had any hearing on the merits at any time, since the hearing before the hearing panel has been classified as discovery. This is an obvious denial of due process of law and a complete failure of fair notice and opportunity to be heard.

14. Thus, by the time the decision of disbarment was rendered, it is clear from the record that petitioner was never allowed opportunity to be heard on the merits, to demonstrate the truthfulness of his proffers, to prove the

reasonableness of his proffers, to demonstrate the reasonableness of relying on his informants with respect to said proffers, or to reasonably understand the precise nature of the charges against him with respect to said proffers, all by virtue of the inconsistencies and vacillations of the conduct and rulings by the hearing panel and the court. Moreover, the DR7-102(A)(1) charge and finding was raised for the first time in the order of disbarment. All in substantial violation of the guarantees of the Constitution and the requirements of due process as defined in In Re Ruffalo, 390 U.S. 544, 88 Sup. Ct. 1222, 20 Law. Ed. 2d 117 (1967).

15. Mr. Jack Focht, a Kansas attorney, testified in federal court that he represented petitioner and handled the entire proceeding leading to petitioner's said disbarment, and that petitioner was

never at any time afforded an opportunity to prove the truthfulness of the proffers made in Robinson v. Brady. Mr. Focht was prepared to prove same. Mr. Focht with full knowledge of the available evidence and information testified in federal court: "My opinion is, based on the information that he [Phelps] had from numerous, many sources, that he had abundant reason to make that proffer". (T-8, 9). Mr. Focht further testified that petitioner has never been afforded opportunity in any court, any place, any disciplinary panel, or any tribunal, to put on that evidence to show that petitioner had abundant reason for the making of said proffers. (T-9). Mr. Focht further testified: "I was prepared to start with expert testimony of what a proffer was, prove the reasonableness of the proffers, the truthfulness of the proffers, all of those things, those

were all excluded as issues". And further, "As a result, witnesses were not called and that evidence was not presented". (T-9). Mr. Focht testified that at the time of oral argument before the Kansas Supreme Court he made the same offer of proof before the Kansas Supreme Court as before the hearing panel, to wit: "I told that court he had never had the opportunity to prove the truthfulness or falsity of it and I stood ready at that time to try to prove it". (T-18). Petitioner was denied notice and opportunity to be heard on the single issue charged with respect to said proffers.

16. Mr. F. G. Manzanares, another Kansas lawyer and co-counsel with Mr. Focht for petitioner throughout the state court disciplinary proceedings, likewise testified in federal court that he was thoroughly familiar with all of the background involving said proffers, and

that in his opinion, petitioner had a sufficient basis to make said proffers, to wit: "I think he did. I still think he [did]. And I don't see anything wrong with the way he did it". (T-166).

17. Mr. R. W. Niederhauser, a Kansas lawyer, was associated with petitioner in the Robinson v. Brady matter, and had complete knowledge of the background thereof. Mr. Niederhauser testified in federal court that he was familiar with the evidence available to petitioner and the investigation that was developed by the investigator Hiett and that was available at the time of the making of the proffers and at the time of the preparation of the motion for new trial. Mr. Niederhauser testified that in his opinion there was a sufficient basis for said proffers. (T-150, 151).

18. Mr. Vern Miller, a Kansas lawyer, and former Kansas Attorney General,

likewise testified in federal court that he was familiar with certain of the factual background and information relative to said proffers, and that in his opinion petitioner had an adequate and sufficient basis to make same, to wit: "I believe so. I think I could have proved that proffer myself if I was the attorney." (T-180).

19. That petitioner had an adequate basis for said proffers is further demonstrated in the case of each of the said witnesses by the record before the hearing panel itself, including the affidavits of Ralph J. Hiett, R. W. Niederhauser, and petitioner filed prior to said hearing, and including the following pages of the transcript of said hearing with respect to each such witness. (Panel Hearing Transcript, pp. 144-45; 300-310; 318-19; 321; 323-329; 381-388; 389-434; 438-442; 444-449;

452; 455-467; 470; 477-487; 491-93; 500-507; 517-531; 543; 546; 555-58; 561-575; 577-580; 584-587- 590-94; 597-99; and, 600-601; Exhibit #C1-C3). We therefore find that upon any test and by any appropriate standard, petitioner was justified in making said proffers, and that the record before us does not demonstrate any ethical violation by petitioner.

20. The record of Robinson v. Brady was offered into the evidence at the panel hearing for a very limited purpose; i.e., to ascertain the context of the proffers. It was improper for the Kansas Supreme Court to consider same as proof of violation of DR7-102(A)(1) with which petitioner had not been charged or given opportunity to be heard. Reasonable minds could not differ on that point. * The record does not support a finding

*Note that at the Robinson v. Brady trial, Mrs. Brady was at all times competently

against petitioner relative to violations of DR7-102(A)(1). Petitioner, like any other trial lawyer, is entitled and indeed required to present his client's position with zealous advocacy and must be given great latitude in the area of vigorous advocacy. With respect to DR7-102(A)(1): (1) petitioner was never at any time charged with having violated DR7-102(A)(1); (2) petitioner was given no notice of any such charge, and no hearing or opportunity to be heard on any such charge; (3) petitioner was expressly prohibited at all times from presenting any evidence on, or being heard in any way on any such charge;

(cont.)
represented by counsel, before a competent trial judge, and there was no objection or finding at any time as to badgering, conducting a vendetta, onslaught, or any such thing. Moreover, plaintiff Robinson's case was nonfrivolous as a matter of law, surviving successive motions for summary judgment, to dismiss, for directed verdict and to strike punitive damages. The case was submitted to the jury on counts of breach of contract and fraud on questions of actual and punitive damages.

and, (4) there is no evidence whatsoever in this record that petitioner did violate DR7-102(A)(1).

21. There is no competent evidence that petitioner had a vendetta against Carolene Brady or that the case of Robinson v. Brady was petitioner's case rather than petitioner's client's case. The client, Sherman Frederick Robinson, testified in federal court: "Well, there is no question about it. It was my suit". He further testified that petitioner never indicated anything other than the clients' interests at heart and the prosecution of the suit, and never indicated any personal feelings against Mrs. Brady. Hazel Robinson, wife of Sherman Frederick Robinson, testified similarly that whether petitioner represented them in the prosecution of the suit or someone else represented them they were still interested in pursuing it: "Yes sir, we was". (T-209, 218). Mrs. Eleonora M. Lyon, C.S.R.,

testified in federal court that prior to the Robinson v. Brady case she consulted petitioner about handling litigation against Carolene Brady and petitioner recommended against it and it was declined. (T-111). Charles Prather, a Kansas attorney, testified in federal court that he was employed by petitioner as a law clerk while attending Washburn University Law School during the prosecution of the Robinson v. Brady case, that he was generally acquainted with the Robinson v. Brady file and performed some work on it personally, that the file was not handled any differently than any other file in the office, and that there was nothing about the way the file was handled that would in any way indicate that petitioner was pursuing any personal vendetta or any personal grudge against Carolene Brady (T-197, 198). Other evidence in this record is to the same effect. There

is no evidence whatsoever in the record that would support a finding that petitioner was conducting a vendetta against Mrs. Brady, or doing anything other than representing a client in a proper manner in the lawsuit of Robinson v. Brady. The evidence found by the Kansas Supreme Court to indicate that petitioner had wanted to sue Carolene Brady for a long time was improperly blurted out by Mrs. Brady at the trial of Robinson v. Brady and was immediately stricken from the record by the trial court and the jury admonished to disregard same. (See Robinson v. Brady transcript, page 634). It was improper for the Kansas Supreme Court to consider such evidence (226 Kan. 371, at 379), and consequently no evidentiary findings should properly be made against petitioner from that record.

22. With respect to the order of disbarment, there was such a failure of

notice and opportunity to be heard as to constitute denial of due process, and there was such a complete infirmity of proof to establish any misconduct whatsoever by petitioner, that a grave injustice would be done for this Court to allow said order to stand.

23. The unlikelihood of petitioner making intentional misrepresentations with respect to said proffers, and the unfairness of the penalty, is further demonstrated by the fact that some 667 witnesses have testified before the federal court that petitioner's reputation for truth, veracity, and competency in the various communities within which petitioner serves is of the highest order.

24. The said order of disbarment by the Kansas Supreme Court is without legal precedent in its entirety, and it is manifestly unjust to create new law and apparently new and unprecedented legal

standards and apply same retroactively to any member of the bar. (U.S. v. Standard Oil, 135 F. Supp. 345, 367; ABA Informal Opinion Nos. C-689, 955; 1271; results of LEXIS scan, pp. 25-26 of "Respondent's Memorandum of Law" filed herein).

25. On the record evidence, as a matter of law, petitioner committed no ethical violation, he was denied fair notice and opportunity to be heard on the charges, there was a complete infirmity of proof to establish any misconduct whatsoever on his part, and a grave injustice has been done.

26. No legal precedent exists for what the Kansas Supreme Court has done in this instance, and the opinion and order of disbarment establishes a dangerous precedent which this Court should rectify.

APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

In the Matter of:	)	
	)	
DISCIPLINARY PROCEEDINGS OF	)	No. ~~80-1001-A~~
FRED W. PHELPS, SR.	)	80-1152
	)	
	)	
	)	

Before:

CHIEF JUDGE FRANK G. THEIS,
SENIOR JUDGE ARTHUR STANLEY, and
DISTRICT JUDGE DALE E. SAFFELS.

Heard at:
Kansas City, Kansas

TRANSCRIPT OF ARGUMENT PRESENTED BY
MONROE H. FRIEDMAN

February 21, 1980.

* * * * * *

MR. FISHER: Your Honor, Mr. Friedman is here from Washington. It is a little out of time, but because he has just a day to spend here -- we had originally planned to call him as an expert witness, but since -- if it is all right with the Court, I would like to move his admission for the purposes of this case.

I would like for him to make, if it is all right with the Court, to make a brief argument with respect to the law as it applies to the case only, and to allow him to participate with me as counsel the balance of the day.

I have a c.v. here and I would like to state into the record what I believe to be appropriate qualifications, and thereafter move his admission.

JUDGE THEIS: Very well. We have discussed that and we are in favor of the

procedure you have proposed.

MR. FISHER: Thank you.

The lawyer is Monroe H. Friedman. He is a professor of law and former dean of Hofstra University Law School. He has been Chairman of the Legal Ethics Committee of the District of Columbia Bar for two terms; Chairman of the Committee of Professional Responsibility, Society of American Law teacher for three terms; Chairman of the Committee of Professional Disciplinary Standards and Procedures of the Federal Bar Association; currently reporter and consultant to the Roscoe Pound Foundation, on project to draft a code of professional standards for trial lawyers.

He has been a consultant to the Special Committee on Courtroom Conduct of the Bar Association of the City of New York, and was awarded a Ford Foundation travel study grant to study lawyers' ethics in the United States and Canada, Scotland and England.

He is the author of a book entitled Lawyer's Ethics and Adversary System, published in 1975, and received the Gavel Award Certificate of Merit from the American Bar Association. The A. B. A. certificate refers to the book as outstanding in its examination of the most difficult ethical problems a lawyer faces. That has been reviewed by about three dozen reviews. All have been favorable, including the A. B. A. Journal, which characterizes it as "scholarly" and "powerful." The George Washington Law Review says it is "undoubtedly the best book published in the field of legal ethics."

Professor Norman Dorsan has described the book as a "monumental contribution to legal education and past generations."

I might add, the book is used currently in a large number of law schools.

He has been a columnist on legal ethics for the New York Law Journal, the National Law Journal has published articles

in the A. B. A. Law Journal, the Journal of Legal Education, the Michigan Law Review, New York University Law Review, Ohio State Law Journal, the University of Pennsylvania Law Review, and the Stanford Law Review, as well as a number of other publications.

He has been cited with approval in a number of judicial opinions, including those in the United States Supreme Court.

He has received the Award of Merit from the District of Columbia, and he has taught legal ethics for a number of years.

He currently, I believe, lectures on legal ethics at bar association meetings and at law schools throughout the United States and abroad.

He has a lot of trial experience and is a member of the Bar of New York, of the District of Columbia, Massachusetts, and Pennsylvania.

He has practiced before the I.C.C., United States District Court for the District

of New York, United States Appellate Court for the Second Circuit, and the Supreme Court of the United States.

He is currently involved in teaching. I believe just recently he has lectured on this subject at Harvard University in the last two weeks.

I have the honor of moving the admission of Monroe H. Friedman for the purpose of this case.

JUDGE THEIS: All right.

Thank you, Mr. Fisher, for your remarks on behalf of Mr. Friedman. He appears to have imposing credentials.

You are welcome to the Bar of the Court Mr. Friedman.

MR. FRIEDMAN: Thank you very much, Your Honor.

May it please the Court. I am afraid I should qualify one thing that Mr. Fisher said. I think he misspoke. There have been more than three dozen favorable reviews of

my book, but I think it is fair to say that there have been five or six that have been critical as well. I wouldn't want you to think that there have not been any adverse reviews.

If your Honor please, the Kansas Supreme Court appears to rely on four provisions of the Code of Professional Responsibility, as well as an analogue to Rule 11 in the Kansas State Rules, and I would like to address myself fairly briefly to each of those, if I might, in terms of the way those provisions are drafted and the way they have been construed -- or provisions like them have been construed -- over the years by the A. B. A. Committee on Professional Ethics and by other authoritative bodies.

One of the provisions that is cited is Disciplinary Rule 1102(A)(5), which relates to conduct of a lawyer that is prejudicial to the administration of justice.

I would submit to Your Honor that that provision, if it is to be the basis for anything as severe as a sanction, as disbarment, or even suspension of a lawyer, would be a classic illustration of a rule that is void for vagueness.

Action or conduct that is prejudicial to the administration of justice is not sufficient to give guides to the person who is affected by the rules or to give adequate guidance to those who are to sit in judgment as to what kind of conduct is covered by it.

But, beyond that, as a general rule of conduct -- and an extremely general one at that -- it could not properly preempt specific provisions that would deal with specific kinds of conduct. And in this case we are focusing, as I understand it, principally upon an offer of proof in court and a motion for a new trial in court. And, since there are specific provisions

that relate much more closely to that kind of conduct, those rules, the more specific ones, would be rendered meaningless if we were to swallow them up with the vague, general standard of conduct prejudicial to the administration of justice.

There would be a similar observation to be made, I think, with regard to Disciplinary Rule 1102(A)(4), which was also relied upon by the Kansas Supreme Court, conduct involving dishonesty and so on.

The history of that rule suggests rather clearly that the principal purpose for putting it in was to bring within the ambit of the Code of Professional Responsibility, non-professional conduct of a lawyer as well as conduct in the representation of a client. So that, for example, if a lawyer is convicted of a crime or found to be engaged in fraud in a commercial dealing having nothing to do with his or

her practice, that lawyer might well be disciplined under 1102(A)(4).

But, there again, if we were to permit a rule as broad, as general, as conduct involving dishonesty, misrepresentation, to govern specific situations that are otherwise covered specifically as such in the Code, we would thereby render whole sections of specific provisions irrelevant as a matter of drafting and thereby violate, among other things, the well-established canon that a rule, statute or rule or regulation, should not be construed in such a way that any part of it is rendered meaningless as a matter of drafting.

That takes us, then, to one of the specific provisions that is referred to. This, I understand, is not looming large in this proceeding but I would like to touch on it briefly. That is Disciplinary Rule 7-102(A)(1), which relates, which prescribes

a lawyer from harassing a witness or another party.

One thing that is particularly significant about 7-102(A)(1) is the obviously purposeful use of the word "merely," -- "A lawyer shall not engage in conduct merely for the purpose of harassing a witness or another party," -- which suggests very clearly that a lawyer is not to be subjected to disciplinary proceedings if what might be characterized as harassment is in the course of other legitimate purposes on behalf of a client.

In that regard, I think that the closely related provision, the one that immediately precedes that one, Disciplinary Rule 7-101(A)(1), is important because it requires the lawyer as a zealot or advocate to give the client the benefit of every legal remedy or defense that might be legally available. And that is an echo of a great

deal of authority, of course, regarding the role of the advocate as a zealot champion of the client's cause. Informal Opinion 689 of the American Bar Association Committee on Ethics and Grievances takes the same position.

That is an instructive case, I think. It is a case where the question was asked by a lawyer: "If I have not had time to review the trial record and the time for filing an appeal is running short, would it be professionally improper for me to file the appeal?" And that was asked, that question was asked, in view of Canon 30 of the old Canons of Professional Ethics, which said that a -- if a lawyer files a pleading in court, such as a motion for an appeal, that that is equivalent to a representation on the lawyer's honor that the case is appropriate for adjudication. The lawyer said, in effect, "It is not clear to me that

I can properly represent to the court on my honor that the case is appropriate for adjudication when I haven't had a chance to review the trial record and, therefore, when I am filing or noting the appeal I may be violating Canon 30."

And the committee said, in Informal Opinion 689, that the lawyer's conduct would be proper, that it would be proper to file that notice of appeal despite the rule that says that it is a representation on his honor that the case is appropriate for adjudication and despite the fact that he doesn't know that.

The Committee turned the standard around, in a sense, and said that it would be unprofessional for the lawyer to file that pleading only if the lawyer honestly believes -- and note the subjective standard -- only if the lawyer himself honestly believes that the case is wholly without merit.

So we have two key phrases, the subjective standard, "honestly believes," the lawyer himself, and that the case is "wholly without merit." And note, too, that the Informal Opinion 689 thereby clearly does not require or impose on the lawyer a duty of inquiry prior to filing the pleading.

One of the issues that was adverted to in Informal Opinion 689 would then be, and was expressly, could it be said that the lawyer is filing this notice of appeal only for delay since he says his purpose is to prevent the clock from running, and in effect, to give him time to look at the record and find out whether there really is an appealable case.

And the Committee again upheld the conduct saying that it would not be only for delay -- and I was addressing myself again to the word "merely" in Disciplinary Rule 7-102(A)(1) -- the Committee said it would not be only for a delay as long as,

again, the lawyer did not honestly believe that the case was wholly without merit.

Then there is Disciplinary Rule 7-102(A)(5), which was referred to or relied upon by the Kansas Supreme Court. And this relates to whether a lawyer knowingly makes a false statement in his representation of a client. This refers back again to my observations about disciplinary rule, the disciplinary rules under Canon 1 that I started out with, because those are general provisions and this is one, 7-102(A)(5), that relates specifically to what the lawyer does, quote, "in his representation of a client."

The key word there, I believe, is the word "knowingly." One of the things that one finds in studying the Code of Professional Responsibility is that there are several different standards used for testing whether a professional obligation has been

triggered by what the lawyer knows subjectively, or objectively, what the lawyer ought to have known, or a reasonable person would have known, or what might have been obvious to somebody else. And it seems clear, therefore, that when the Code, or the codifiers of the Code picked one of these phrases or words, they did so consciously. I think that is a presumption, at any rate, that a court must presume.

One might suspect that there was some carelessness in the drafting, but I am not sure it is fair to discipline a lawyer on the grounds that the codifiers were just sloppy and they meant to impose a higher standard than they, in fact, did.

And so I think it is significant that in Disciplinary Rule 7-102(A)(5), the purely subjective standard is used of what the lawyer himself knows.

It is worth comparing, for example, the sub-section, another sub-section of the same provision, Disciplinary Rule 7-102(A)(1). There it says that the lawyer will be disciplined for the conduct that is prohibited under that sub-section if the lawyer knows or it is obvious that the facts are thus and so.

Now, I think it is interesting that under 7-102(A)(1), the lawyer will not be disciplined, apparently, even if a reasonable person might have come to that conclusion. It has to have been even a higher standard, a more difficult, stringent standard. It has to have been obvious, presumably, to some objective observer, or the lawyer will not be disciplined.

But we don't even have that standard under the provision that the Kansas Supreme Court relied on. There is not even the objective, or it is obvious, the standard

used under 7-102(A)(5), the one that is relevant here.

The only word that is used is "knowingly" and that would suggest clearly that the test, that the proper standard that the Kansas Supreme Court should have been concerned with was whether Mr. Phelps' subjective state of mind was one of knowing. Irrespective of whether a particular conclusion might have been obvious to somebody else, the test was did he, himself, in his own mind, know it.

There is another interesting development in the law; of course, the Kutak Commission has been commissioned by the American Bar Association to revise the present Code of Professional Responsibility. The Kutak Commission has been criticized by myself and by quite a few others for unduly broadening the obligations that are put upon a lawyer with regard to the lawyer's rela-

tionship with the client and suggests that the lawyer should in some instances, for example, violate the confidences of a client.

The Kutak Commission has gone in a particular direction which would provide for more discipline, in effect, of lawyers for zealous representation of clients; thereby, I feel, undercutting the traditional role of the lawyer. But it is significant, therefore, that in the most recent draft of the Kutak Commission, in Section 31.(a)(3), Section 3.1(a)(3), they would forbid the lawyer to offer evidence that turns out ultimately to have been false only if the lawyer is himself convinced beyond a reasonable doubt that it is false.

Now, that is yet a new standard. It is a different standard. It is a standard, as I say, that has been adopted by a commission that has become famous or notorious,

as the case may be, for imposing additional, new and additional, burdens on the lawyer.

And even the Kutak Commission would require in a case similar to the one that we are dealing with, that there be a finding that the lawyer himself subjectively was convinced beyond a reasonable doubt that the testimony, or the proffer, was false.

That, of course, has not been adopted by the A. B. A. We still have the even higher standard, more difficult standard, for the disciplinary committee to meet.

In addition, there is the long established obligation upon the lawyer, the duty upon the lawyer, to resolve doubts in favor of the client and to plead the client's case in the light most favorable to the client. That is a position that was adopted some years ago by a joint conference of the American Bar Association and of the Association of American Law Schools. It is quoted in Footnote No. 9 to Ethical Consi-

deration 7-3 of the Code of Professional Responsibility. There is a joint conference viewpoint that is quoted under Ethical Consideration 7-3 in Footnote No. 9. And that establishes not a novel doctrine, but a well-established rule, of course, that the lawyer has a duty to resolve doubts in favor of the client and to plead the client's case in the light most favorable to the client.

Sometimes in the literature one finds the expression that this duty to plead the client's case in the light most favorable to the client must be presented honorably. And then the question might be raised, "What does 'honorably' mean when you are pleading the case in the light most favorable to the client?" What if you know that there are other facts which if known would undermine the client's position? And it has been established that pleading the case

honorably in the light most favorable to your client's position does not mean revealing information that would undermine the client's case or conveying to the court doubts that the advocate might have about the client's case.

One case on that in the Ninth Circuit is McCartney against the United States, McCartney against the United States, and it is noteworthy because that, too, is cited in a footnote to the Code of Professional Responsibility. That is in Note 11 to Ethical Consideration 7-4. Note 11 to E. C. 7-4.

Therefore, you will find in the literature on lawyers' ethics, decisions like Informal Opinion 1271. That is a case that I think has particular relevance here.

In Informal Opinion 1271, the question came up, "What happens when a client comes to the lawyer, a woman comes to a lawyer

and says that she wants a divorce, and she reveals to the lawyer in the course of counseling that she had committed acts, perhaps adultery, or in fact in that case the fact that she had had a child by a man other than her husband, that would constitute recrimination under state law and that therefore would be a defense to the divorce and, if known to the court, might very well preclude the divorce from being granted?" And the lawyer says, "Can I plead, since I know, now that I know this, can I properly plead that there is no recrimination, that the child is the child of the father?" And the committee says, "It is clear that you can't do that." He said, "Well, then, can I submit a pleading that doesn't refer to that, to the fact that there is a defense here, that I have knowledge that would preclude this action from proceeding to a successful conclusion for my client?" And

the committee said, significantly, that is equally clear, "You can plead that case, and you should not make reference to the facts that you know regarding recrimination."

And there have been similar decisions, of course, with things like pleading a case where the lawyer knows the statute of limitations has run and that therefore in a sense the case has no merit; or that the statute of frauds would bar the action; and yet the lawyer is permitted to file that case without saying, "But, you know, I am filing this case on behalf of my client, but you ought to know, Your Honor, that the statute of limitations has run," or, "the statute of frauds would be a bar." It is not appropriate for the lawyer to add that qualification.

There is an interesting case, Osivado, in the Second Circuit, which holds that it is only unprofessional for a lawyer to plead a case for a client where the case

on the facts is so utterly frivolous and completely lacking in any merit as to permit but one conclusion, and that is that the lawyer was well aware of its meritlessness. And, interestingly, in the Supreme Court it has been expressly held that meritlessness is not enough, that that is not an adequate standard for a lawyer to withhold argument.

In the Anders case, A-n-d-e-r-s, a 1967 case in the Supreme Court of the United States, the lawyer submitted a letter to the court saying that he didn't want to proceed with the appeal because he found it to be meritless.

The standard used by the Second Circuit, and the Court says that is not enough, you can withhold argument only if you -- only if you reach the conclusion that the case is wholly frivolous. Wholly frivolous. And that has been characterized

as a judgment by the lawyer that the case is, quote, "a clear and hopeless loser." "A clear and hopeless loser." Otherwise, the lawyer's duty is to go forward, is to present anything that might arguable -- another phrase, as I recall, from Anders -- any argument that, any position that might arguable support the client's position.

Then there is Rule 11 of the Federal Rules of Civil Procedure and the analogue to it that was cited by the Kansas Supreme Court.

The key phrase under Rule 11, of course, is that the lawyer is certifying that to the best of his knowledge, information and belief, there is good ground to support the pleading.

I think it is interesting that under Rule 11 itself there is another key phrase, and that is that a lawyer will not be disciplined for a violation of Rule 11, even

showing there is one, unless there is a finding -- and this is by the terms of the rule itself -- unless there is a finding that the lawyer has committed a whillful [sic] violation of that rule.

First, I would say that Rule 11 itself, for disciplinary purposes, should be narrowly construed. Let me amend that. Not just for disciplinary purposes but in the lawyer's own mind when the lawyer is litigating the case, Rule 11 should be narrowly construed by the lawyer in the interest of the client.

That is Ethical Consideration 7-3. And that is certainly the thrust of the Code of Professional Responsibility generally.

If you come upon a rule you don't construe it broadly against the interest of your client. You construe it narrowly and as consistent as possible with the

interests of the client. At least, that is, when you are acting as an advocate. As a counsellor, your private advice to the client might be otherwise. And I think it is significant, too, that Rule 11 does not have a requirement that the lawyer make reasonable inquiry, or that the lawyer certify that reasonable inquiry, or that the lawyer certify that reasonable inquiry has been made, and that is significant because the Federal Rules of Civil Procedure themselves do have such a requirement under Rule 36(a).

The fact that there is reasonable inquiry specifically provided for, or imposed upon the lawyer under 36(a), that is with regard to requests for admissions, but not under Rule 11, helps to explain an appropriately narrow construction of what the lawyer's obligation is under Rule 11.

Coincidentally, I -- let me back up.

In 1965, under a Ford Foundation grant, I was Director, Co-Director of a criminal trial institute in Washington, D. C. which became kind of forerunner to the NITA Program, National Institute of Trial Advocacy. And I helped to set up a NITA-like program at Hofstra Law School when I was Dean, and recently participated as a teacher in a NITA program at Harvard Law School.

The coincidence is that in the course of one of the moot arguments or trials that the students were conducting, there was the occasion for making an offer of proof. And the other lawyer, the other trial specialist, and I, who were running that particular session, therefore had the occasion to comment on the appropriate way to make an offer of proof. This was before I ever heard of Fred Phelps, much less agreed to appear as an expert witness on his behalf. And I thought that it was

particularly important to impress upon the students that what I have always heard myself from other trial lawyers and in other sessions such as National Institute of Trial Advocacy, and that is that in a way an exclusion of evidence by the court can be an advantage, a tactical advantage, because it give [sic] you the opportunity to make an offer of proof. In fact, you are under an obligation to make an offer of proof. And that offer of proof from the mouth of the lawyer frequently will appear on the record far more persuasively, coherently, if the lawyer is doing his or her job it will, than coming from the mouth of a lay witness on the witness stand. And I added that the witness on the witness stand is going to be subject to cross-examination and there is no obligation, of course, for the lawyer to say, "But let me add, Your Honor, to my offer of proff [sic] that this witness is

very nervous and not terribly bright, and therefore I think he is going to get cut up pretty badly on cross-examination." Or, "This witness has expressed some doubts to me which I don't think undermine the testimony as such, but I want you to know about that."

On the contrary, the offer of proof is generally understood by the trial bar and by people who teach trial lawyers, is to be made as strongly and as effectively as the lawyer can make it. And the lawyer is not expected to interpose qualifications or limitations as to what might develop on cross-examination, or whatever.

Now, the suggestion was also made at the state level that a motion for a new trial is different.

I guess the idea most strongly suggested is that a lawyer in the heat of a trial might say something in an offer of

proof but then on more sober reflection before making a motion for a new trial or learning additional information before making a motion for a new trial, might be under a higher obligation to temper the zealousness with which the lawyer acts as advocate, and that, therefore, even if Mr. Phelps did not commit a violation with his offer of proof, when he made a motion for a new trial, adverting to that motion for an offer of proof, that that was something of separate and special significance.

Now, referring again to the Anders case in the Supreme Court. The Supreme Court held that the lawyer, the appellate lawyer, the lawyer after the trial, has an obligation to refer to anything in the record that might arguable support the appeal. Anything in the record that might arguable support the appeal. And that is echoed, in fact Anders itself is quoted in

Informal Opinion 955, Informal Opinion 955 of the A. B. A. Committee.

I think it is important to note, too, that when a lawyer makes a motion for a new trial, it has never been understood, to my knowledge, that the lawyer is saying, "I am making a motion for a new trial because in my judgment I could win a new trial."

On the contrary, what the lawyer is saying is, "This trial from which I am appealing was not pursuant to law on the face of the record. This trial from which I am appealing was not pursuant to law on the face of the record as the record was made."

It is not inappropriate, for instance, for a lawyer to file such a motion when the lawyer's intention is not to retry the case but to renegotiate a settlement on the basis of the fact that the first trial has been upset. And that was held in Informal Opinion 689, which I referred to earlier, also.

Imagine, for instance, if in this particular case Mr. Phelps had made an offer of proof that a witness would testify in such and such a way, and then subsequent to the trial and before the filing of a motion for a new trial that witness had died, so that he would never be available in a new trial.

It is clear to me that it would still be appropriate for Mr. Phelps to say, "There was a denial of, in effect, due process at that trial because that witness should have been heard at that trial, even though I will never be able to put that witness on again."

I think there is another parallel situation in the record of this very case. The plaintiff in this case called up, or somebody acting for the plaintiff called up, the defendant and spoke with a woman on the telephone, not the defendant, and gave certain information. And the issue became,

Did that constitute notice to the defendant? And what happened was, it was not shown on the face of the record that the woman on the telephone was an agent of the defendant. And it was argued, when subsequently there was an objection made with regard to that particular piece of evidence, it was argued by the defense that the record doesn't show that this woman was an agent.

I submit to you, it would be proper for the lawyer representing the defendant to make that argument even if that lawyer knew who the woman was on the telephone, and even though the lawyer knew that she was an agent, it would still be proper for the defense lawyer in this case to argue the record fails to disclose the identity of that woman and whether she was an agent, and, therefore, it cannot be raised on appeal that there was a showing that notice had been given.

There is another case that comes to mind. It was held by the Law Society in England when a solicitor committed an inquiry. The solicitor said, "I litigated a divorce case for my client. After the case was over and the divorce was granted, I found out that my client had committed perjury, had obtained the divorce through perjury. What is my obligation?"

And the Law Society of England held in a published opinion that the solicitor's obligation was to remain silent.

Now, imagine if that same client then came back to the solicitor and said, "I am being prosecuted for bigamy because I got married after that divorce." Would it not be proper for the solicitor to raise the divorce as defense for the bigamy charge? I think it clearly would be. That is a decision of record, granting the divorce from the first marriage. And even though the lawyer now knows that if the court in

the first case had known the truth, the divorce would not have been granted.

I have argued publicly and very strongly that the bar is delinquent in policing its own membership; that we have failed as a profession adequately to police improper conduct by lawyers. I have argued in support of the so-called "Informer Provision" of the Code that requires one lawyer to reveal to the appropriate authorities unprofessional conduct by other lawyers. And I am distressed by the fact that a large number of lawyers I know think that it is improper to put an obligation on each of us to oversee the conduct of our colleagues. I think we should have such an obligation.

And yet, despite the strong feeling that I have about the importance of each of us assuming an obligation to police conduct of our fellow lawyers, I feel no less strongly that this particular case is one that should never had been brought.

I spent about an hour with Mr. Phelps and his lawyer and they explained the facts of the case to me as they understood them, and as to some extent I have been able to confirm them from reviewing the record of the case. And after I had listened to the allegations that had been made, that Mr. Phelps had made an improper offer of proof and that he had improperly filed a motion for a new trial, finally I turned to Mr. Phelps and I said, "Mr. Phelps, I have the feeling you are not telling me everything." He said, "What do you mean?" I said, "It is pretty clear to me that people are after you for something and I would like to know what it is." And I asked that question because I have had cases, representing lawyers, or testifying as an expert witness on behalf of lawyers, where lawyers had angered the established bar by being involved in controversial cases.

I also had a situation where the prosecutors were after the lawyer on ethical grounds because they thought he was involved in organized crime and they couldn't nail him on that. And I was interested in knowing what I was dealing with, because it was as clear to me as it could be that the kind of conduct that Fred Phelps was accused of is commonplace among the bar; that it is proper conduct; and that it would never be subjected to a disciplinary attack unless there was some other motive.

And Mr. Phelps kind of smiled and he said, "Well, the fact is, that I have been very heavily involved in civil rights and civil liberties cases, representing a lot of people that some people would rather not have me represent, and I know I have made some enemies out of that."

And, frankly, that all fell into place with me, for me, and I pulled a book

off my shelf and I showed them the quote from the Harvard Civil Rights, Civil Liberties Law Review of only about ten years ago, that it has become professionally dangerous for a lawyer to be involved in representing poor people and in representing unpopular clients and unpopular causes.

And I submit to Your Honors that I have come to the conscientious judgment that this is just such a case.

Thank you.

JUDGE THEIS: We will take a recess now.

Thank you for your presentation, Mr. Friedman.

We will stand in recess for about fifteen minutes and then we will return.

(R E C E S S)

REPORTER'S CERTIFICATE

I hereby certify that the proceedings had in the above-entitled cause before Chief Judge Frank G. Theis, Senior Judge Arthur Stanley, and District Judge Dale E. Saffels, United States District Court for the District of Kansas, were reported in shorthand by me and under my supervision; and that the foregoing typewritten transcript consisting of 30 pages is a true, correct, and complete transcript of the official shorthand notes of the argument presented by Monroe H. Friedman as hereinbefore set forth.

_____

Jean R. Shanholtzer
Official Reporter
District of Kansas